No. 99-7504-CFH Title: Christopher A. Lopez, Petitioner
v.
Randy J. Davis, Warden, et al.

Docketed: December 20, 1999 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Dec 15 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 19, 2000)
	Mar 24 2000	Brief of respondent United States filed. VIDED.
	Mar 31 2000	Supplemental brief of petitioner Christopher A. Lopez filed.
	Apr 6 2000	DISTRIBUTED for Conference of April 21, 2000
	Apr 24 2000	Petition GRANTED. SET FOR ARGUMENT October 30, 2000. **********
	May 31 2000	Order extending time to file petitioner's brief on the merits to and including June 29, 2000.
	Jun 28 2000	Joint appendix filed.
	Jun 28 2000	Brief of petitioner Christopher A. Lopez filed.
	Jun 29 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Aug 1 2000	Order extending time to file government's brief on the merits to and including August 9, 2000.
	Aug 9 2000	Brief of respondent United States filed.
	Aug 18 2000	Record filed.
	Aug 25 2000	Record filed.
	Sep 7 2000	Reply brief of petitioner Christopher A. Lopez filed.
	Sep 15 2000	CIRCULATED.
	Oct 30 2000	ARGUED.

Supreme Court, U.S.
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99-750

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

C.A NO. 99-1611
D.C. NO. 98-4223

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mark V. Meierhenry
Danforth, Meierhenry
& Meierhenry, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075

Attorney for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether the director of the Bureau of Prisons has the authority to categorically deny consideration for eligibility for early release as proscribed by 18 U.S.C. § 3621(e)(2)(B) to an inmate convicted of a nonviolent offense after the inmate has completed the requisite residential substance abuse program.

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

CHRISTOPHER LOPEZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	PETITION FOR WRIT OF CERTIORARI

The Petitioner, Christopher Lopez, by and through his appointed counsel of record, Mark V. Meierhenry, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 10, 1999, petition for rehearing or rehearing en banc denied September 16, 1999.

QUESTION PRESENTED FOR REVIEW

Whether the director of the Bureau of Prisons has the authority to categorically deny consideration for eligibility for early release as proscribed by 18 U.S.C. § 3621(e)(2)(B) to an inmate convicted of a nonviolent offense after the inmate has completed the requisite residential substance abuse program.

OPINIONS BELOW

On August 10, 1999, the Court of Appeals for the Eighth Circuit entered an opinion reversing the decision of the United States District Court for the District of South Dakota which held that the director of the Bureau of Prisons does not have the authority to categorically deny consideration for early release under 18 U.S.C. § 3621(e)(2)(B) to inmates convicted of nonviolent offenses. Bellis v. Davis, 186 F.3d 1092 (8th Cir. 1999). Petition for rehearing and rehearing in banc were denied on September 16, 1999. A copy of the opinion of the Court of Appeals is attached as Appendix 1. A copy of the opinion and order of the District Court is attached as Appendix 2.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner is seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 10, 1999. Petition for rehearing or rehearing en banc was denied by the Untied States Court of Appeals for the Eighth Circuit on September 16, 1999. See Appendix 3.

STATUTORY & REGULATORY PROVISIONS INVOLVED

1. 18 U.S.C. § 922(g). Appendix 4.
2. 18 U.S.C. § 924(c). Appendix 5.
3. 18 U.S.C. § 3621(e). Appendix 6.
4. 28 C.F.R. § 550.58 (1995). Appendix 7.
5. 28 C.F.R. § 550.58 (1997). Appendix 8.

6. Bureau of Prisons Program Statement 5162.02 (July 24, 1995). Appendix 9.
7. Bureau of Prisons Program Statement 5162.04 (October 9, 1997). Appendix 10.
8. Report 103-320, U.S. House of Representatives Committee on the Judiciary. Appendix 11.

STATEMENT OF THE CASE

The Petitioner, Christopher A. Lopez, is currently serving a 72-month sentence for his conviction of possession with intent to distribute methamphetamine. His anticipated release date from prison is June 2, 2002.

Petitioner Lopez, along with nine other prisoners, filed petitions with the U.S. District Court for the District of South Dakota seeking a writ of habeas corpus instructing the Warden of the Federal Prison Camp at Yankton, South Dakota to grant them a one-year sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(b).

The prisoners contention was that the Bureau of Prisons improperly classified them as ineligible for early release under 18 U.S.C. § 3621(e)(2)(b) in light of the Eighth Circuit's decision in Martin v. Gerlinski, 133 F.3d 1076 (8th Cir. 1998). Title 18 U.S.C. § 3621(e)(2)(b) provides for a one-year sentence reduction for prisoners who successfully complete the Residential Drug Abuse Program.

On January 6, 1999, the U.S. District Court for the District of South Dakota granted the petition of Petitioner Lopez and ordered the Bureau of Prisons to re-evaluate Lopez

for early release in accordance with its opinion. The District Court concluded that under the language of 18 U.S.C. § 3621(e)(2)(b), Martin, and Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998), the Bureau of Prisons exceeded its statutory authority by categorically declaring certain inmates who had not been convicted of violent offenses ineligible for the early release provision.

The government then appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit. The Petitioner's case was consolidated on appeal with that of the nine other inmates making similar petitions for writs of habeas corpus. The case was decided on August 10, 1999, by Judges Loken, Hansen and Morris Sheppard Arnold of United States Court of Appeals for the Eighth Circuit. The Circuit Court concluded that the Bureau of Prisons acted within in its authority in excluding Lopez from the early release program. See Exhibit 1.

Lopez submits that the director of the Bureau of Prisons does not have the authority to categorically deny consideration for early release under 18 U.S.C. § 3621(e)(2) to inmates convicted of nonviolent offenses. The decision of the Eighth Circuit reversing the District Court is in direct conflict with the plain language of the statute and the intent of Congress and is in conflict with the Sixth Circuit's holding in Orr v. Hawk, *supra*.

REASONS FOR GRANTING WRIT

I. THE BUREAU OF PRISONS IS EXCEEDING ITS STATUTORY AUTHORITY AND ACTING IN DIRECT CONFLICT WITH CONGRESSIONAL INTENT IN APPLYING 18 U.S.C. § 3621(e)(2)(B) WHICH AFFECTS A FEDERAL LAW OF EXCEPTIONAL IMPORTANCE IN THAT IT DEALS WITH THE LIBERTY OF PERSONS WHO ARE INCARCERATED AND MAY BE ELIGIBLE FOR RELEASE.

This case involves the erosion of congressionally mandated rehabilitation.

The United States federal prison population has soared from 21,266 inmates housed in federal facilities in 1970 to 106,536 inmates as of May 1998. Federal Bureau of Prisons *Quick Facts*, updated October 1999. The population has risen to 120,671 as of October 1999. Id. The prison population increase has been caused predominantly by sentencing guidelines effecting drug users. Id.

According to the reports of the Bureau of Prisons, in 1970, of the 21,266 federal inmates, only 16.3% of those inmates were imprisoned for drug related offenses. Id. In comparison, of the 106,536 inmates incarcerated in 1998, 58.9% of those inmates were imprisoned for drug related offenses. Id.

The percentage of federal inmates convicted of drug offenses rose 361% over a 28-year period. Id. And that does not include those inmates that are incarcerated for crimes not characterized as drug offenses but for which drugs played an integral role in the offense. Id.

There can be no argument that drug addiction is the most rampant plague that this country has had to face in the latter

part of the twentieth century. As the numbers show, the federal prison population has increased over 500% in a little short of thirty years because of drugs. Id.

In 1990, Congress recognized that something had to be done to assist in the rehabilitation of those prisoners that suffered from drug addiction. Without treatment, there could be no hope to prevent continued involvement with drugs once an inmate returned to society. Congress's answer was 18 U.S.C. § 3621.

In subsection (b) of that statute, Congress required the Bureau of Prisons to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." Id.

In a further effort to promote rehabilitation of inmates suffering from drug addiction, Congress enacted an incentive program to encourage inmates to participate in rehabilitation programs. The incentive program, enacted in 1994, provided that if a federal prisoner would enroll in and successfully complete a the Bureau of Prisons' drug treatment program, then the inmate would be eligible for a sentence reduction of up to one year. Title 18 U.S.C. § 3621(e)(2)(B) provided as follows:

> **(2) Incentive for prisoner's successful completion of treatment program.** - . . .
> **(B) Period of Custody.** - the period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

The legislative history of 18 U.S.C. § 3621(e)(2)(B) indicates that both Congress and the President recognized the interrelationship of drugs and crime.

Report 103-320 of the House of Representatives Committee on the Judiciary outlines the clear statistical data showing that drug addiction equals crime and that by treating inmates' drug problems, recidivism can be dramatically reduced. Appendix 11. The report states that drug addiction increases an inmate's rate of predatory criminal activity by more than 800%. Id. at 2-3. Further, one particular study done showed that when inmates received drug treatment in prison, three years after being released from custody, 78% remained out of prison. Id. at 3. While in that same time period, of those that did not receive treatment, half were back in prison. Id. at 3.

From 1990 (when treatment was first made available to inmates) to 1994, only 6,000 of over 100,000 inmates were involved in the drug treatment program. Id. at 3. This was unacceptable to Congress and the President. Id. at 4.

The Committee on the Judiciary of the United States House of Representatives noted the absolute need for incentives to encourage inmates to participate in the programs. Id. at 3. The Committee's report states:

> The Committee believes . . . an incentive is necessary to draw into treatment many inmates who may not otherwise be willing to undergo a difficult and painful treatment program. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort and commitment from the

> participants. The experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life opportunities, and will undertake to complete the program.

Id. at 4.

As the Court will note from the Committee's report, the incentive contained in 18 U.S.C. § 3621(e)(2)(B) was of monumental importance in the overall plan to provide inmates with drug treatment.

Congress did make one proviso on eligibility for the drug program. In enacting the incentive provision of 18 U.S.C. § 3621(e)(2)(B), Congress excluded from consideration for the sentence reduction those inmates convicted of violent offenses.

The Bureau of Prisons has gone one step farther and enacted regulations that categorically exclude from consideration for the incentive program inmates convicted of non-violent but whom the director feels in her discretion should be excluded from case-by-case eligibility. Based on the director's discretion, the inmates listed in BOP Program Statement 5162.04 do not warrant individual consideration and categorically ineligible.

The Eighth Circuit Court of Appeals upheld the BOP's actions in Bellis v. Davis, 186 F.3d 1092 (8th Cir. 1999).

The Eighth Circuit Court of Appeals and the Bureau of Prisons have destroyed Congress's incentive plan as incorporated in 18 U.S.C. § 3621(e)(2)(B). The effect of the ruling by the Eighth Circuit Court of Appeals in Bellis is

that the Bureau of Prisons through its erroneous classification system can refuse to implement 18 U.S.C. § 3621(e)(2)(B) as clearly intended by Congress.

As a result of the erroneous ruling, the congressional intent of promoting drug rehabilitation is in serious jeopardy.

During 1994, 535 members of Congress debated and crafted a system to encourage rehabilitation. The bill was signed by President Clinton. With the ruling below now in her back pocket, the director of the Bureau of Prisons as one person can destroy the entire statutory scheme by the exercise of her discretion unfettered by overzealous Courts of Appeal.

Based on the director's cart blanche discretion given to her by the Court of Appeals, the Bureau of Prisons has now expanded that exclusion to include inmates convicted of violation of the Northern Pacific Halibut Act, violation of the National Fishery Management Program, violation of the Antarctic Marine Living Resources Convention, and violation of the North Pacific Anadromous Stock Convention. Appendix 10 at 13.

The entire statutory scheme envisioned by Congress will be destroyed if the Court of Appeals ruling stands and the director of the Bureau of Prisons has the power to categorically deny inmate access to the drug treatment programs they so desperately need.

The BOP relies on Congress's use of the word "may" in 18 U.S.C. § 3621(e)(2)(B) as a license to amend the United States Code and disregard the plain meaning of the statute.

1. The word "may" in a statute does not delegate to an agency that authority to change the clear meaning of the statute.

Title 18 U.S.C. § 3621(e)(2)(B) provides that after an inmate completes his drug program, his sentence "may be reduced by the Bureau of Prisons." It is this language upon which the BOP relies as its blanket authority to categorically exclude whoever it so desires.

The BOP is claiming that the term "may" in 18 U.S.C. § 3621(e)(2)(B) effectively grants the BOP the power to determine categorically which inmates can be considered for the benefits of the statute. Had Congress intended that the BOP was the proper judge of eligibility, Congress would not have limited the eligibility to those convicted of non-violent offenses. Congress would have stated that the BOP has the sole discretion to determine which prisoners should be eligible and which prisoners should not be eligible.

The word "may" as used in the sentence does not show an intent by Congress to give the BOP the authority to determine which classes of inmates shall be eligible. The word is used in an effort to avoid creating a right to a sentence reduction for every prisoner who fits the category. It is a way to grant the BOP the discretion to deny early release in those special situations where release may not be warranted. It

should not be construed as an invitation to rewrite the statute and limit the class of prisoners which are eligible for the program contrary to Congress's direction.

The United States Supreme Court has addressed the attempt by an agency to use limited discretion granted by Congress as authority to rewrite the legislative scheme passed by Congress. In MCI Tel. Corp. v. AT&T Co., 512 U.S. 218, 144 S.Ct. 2223, 129 L.Ed. 182 (1994), the Federal Communications Commission (FCC) attempted to detarrif all nondominant long distance carriers which were required to file tariffs with the FCC under 47 U.S.C. § 203(a). This attempt by the FCC effectively exempted every long distance carrier from the filing requirement of § 203(a) except AT&T.

The FCC relied on the language provided in 47 U.S.C. § 203(b) as its authority to detariff any common carrier it so chose. 512 U.S. at 223, 114 S.Ct. at 2228. Section 203(b) authorized the FCC to "modify" any requirement of § 203. Id.

The Supreme Court held that the authority of the FCC to "modify any requirement" of 47 U.S.C. § 203(a), as provided in § 203(b), did not authorize the FCC to make basic and fundamental changes in the regulatory scheme enacted by Congress. Id.

In so holding, the Supreme Court reasoned:

> "What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."

512 U.S. at 231-32, 114 S.Ct. 2232.

The same analysis can be used in deciding the case at hand. What the BOP is doing is attempting to fundamentally revise 18 U.S.C. § 3621(e)(2)(B). The BOP is attempting to change the statute from one that allows the early release of prisoners convicted of nonviolent offenses to a statute that allows early release only to prisoners convicted of nonviolent offenses and who also have not been convicted of possession of a firearm or have not received a sentence enhancement for possession of a firearm. As the Supreme Court said: "That may be a good idea, but it was not the idea Congress enacted into law" by its passage of § 3621(e)(2)(B). Id.

Even in MCI, where Congress has specifically granted an agency the power to "modify" the law as enacted by Congress; the Supreme Court has held that the agency may not fundamentally change the basic tenants of Congress's enactment. The FCC could not, under the guise of discretion, exclude from the tariffing requirement certain common carriers. The BOP cannot categorically deny eligibility of certain prisoners.

2. The Court need not give deference to an agency's interpretation when such interpretation is in conflict with the plain language of the statute.

The District Court held that the BOP had "exceeded its authority by interpreting 18 U.S.C. § 3621(e)(2)(B) in a manner inconsistent with the plain language of the statute." Appendix 2 at 7. Title 18 U.S.C. § 3621(e)(2)(B) specifically

states which prisoners will be eligible for a sentence reduction. Any attempt by the BOP to limit the classes of prisoners that are eligible in excess of the class stated in the statute is an interpretation inconsistent with the plain meaning of the statute.

An agency's interpretation of a statute is to be accorded no deference by the reviewing court when the agency's interpretation is inconsistent with the plain meaning of the statute. Martin, 133 F.3d at 1079 (citing Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989)). Thus, the Court is not required, and should not, give deference to the BOP's interpretation of 18 U.S.C. § 3621(e)(2)(B).

II. THE EIGHTH CIRCUIT'S RULING IS IN DIRECT CONFLICT WITH THE LAW OF THE SIXTH CIRCUIT.

The Sixth Circuit has already addressed the BOP's flagrant attempt to disregard the will of Congress. In Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998), the Sixth Circuit held invalid the BOP's attempt to classify a violation of 18 U.S.C. § 922(g) - felon in possession of a weapon - as a crime of violence and thus deny inmates access to 18 U.S.C. § 3621(e)(2)(B).

The Orr court held that the BOP had exceeded its authority when it denied eligibility for early release based on a conviction of felon in possession of a weapon under 18 U.S.C. § 922(g). The Court ruled that the BOP "has no choice but to define `nonviolent offense' under 18 U.S.C. §

3621(e)(2)(B) by reference to what might constitute a ``crime of violence." Id. at 655 (citing United States v. Mayoette, 76 F.3d 887, 889 (8th Cir. 1996)). The first step in determining eligibility is to determine whether the prisoner has been convicted of a "crime of violence."

The Court in Orr specifically held that violation of 18 U.S.C. § 922(g) was not a "crime of violence." The Court stated: "No section of the United States Code defines crimes of violence - with the exception of the repealed 42 U.S.C. § 3796ii-2(1)(A) - to include 18 U.S.C. § 922(g) as a violent crime. Several sections of the Criminal Code define crimes of violence, but none mentions mere possessory offenses as falling within its purview." Id. at 655-56.

The Court concluded: "[i]t follows, then, that if the BOP cannot deny eligibility for consideration for early release to anyone who has committed a nonviolent offense, it can deny eligibility only to those who have committed a crime of violence." Id. (emphasis added).

The Sixth Circuit found that the operative language of § 3621(e)(2)(B) is "convicted of a nonviolent offense". Any attempt by the BOP to categorically deny eligibility based on other ground is against the plain language of the statute. Orr, at 655.

The Sixth Circuit has rejected the BOP's position that the language "may be reduced" gives BOP unfettered authority to limit eligibility to the early release program.

A conviction for felon in possession of a firearm and a felony conviction coupled with a sentence enhancement for possession of a firearm are not convictions for crimes of violence. The Sixth Circuit has ruled that such considerations are an impermissible foundation upon which to deny eligibility for sentence reductions. The Eighth Circuits decision in Bellis, *supra*, is in direct conflict.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Dated this 14th day of December, 1999.

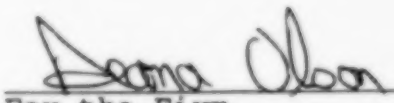
Mark V. Meierhenry
Danforth, Meierhenry & Meierhenry
315 South Phillips Avenue
Sioux Falls, SD 571204-6318
(605) 336-3075

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Writ of Certiorari and Appendix for Writ of Certiorari was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 15th day of December, 1999.

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Ted McBride
Craig P. Gaumer
Assistant United States Attorney
PO Box 5073
Sioux Falls, SD 57117-5073



For the Firm
Danforth, Meierhenry & Meierhenry
315 South Phillips Avenue
Sioux Falls, SD 571204-6318
(605) 336-3075

EDITOR'S NOTE

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99-7504 (3) ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

C.A NO. 99-1611
D.C. NO. 98-4223

CHRISTOPHER A. LOPEZ,

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RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS,

Respondent.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

Mark V. Meierhenry
Danforth, Meierhenry
& Meierhenry, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075

Attorney for Petitioner

10 784

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APPENDIX 1

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 99-1203/1204/1205/1206/1207/1211/1212/1213/1214/1611

Calvern J. Bellis, Shon Pierson, Brian T. Shields, David J. Miller, Thane Martin, George Cook, Ryan Scott Clark, Sean A. Winston, Tim Walker, and Christopher A. Lopez,	*	
Appellees,	*	Appeals from the United States District Court for the District of South Dakota.
v.	*	
Randy J. Davis, Warden, Federal Prison Camp, Yankton, South Dakota; and Federal Bureau of Prisons,	*	
Appellants.	*	

Submitted: May 12, 1999

Filed: August 10, 1999

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In these consolidated appeals, ten federal prisoners petitioned for a writ of habeas corpus, *see* 28 U.S.C. § 2241(a), against the U.S. Bureau of Prisons (BOP) and Warden Randy Davis of the Federal Prison Camp in Yankton, South Dakota. Each of the appellees has completed or is scheduled to complete the BOP's voluntary residential drug abuse treatment program, *see* 18 U.S.C. § 3621(b). The statute, *see* 18 U.S.C. § 3621(e)(2), authorizes the BOP to offer an early-release incentive to certain federal prisoners in order to encourage them to enroll in its voluntary drug abuse treatment program. The statute also provides that "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve," *see* 18 U.S.C. § 3621(e)(2)(B).

To implement the statute, the BOP promulgated regulations and a program statement which together define inmates' eligibility for the early-release incentive. *See* 28 C.F.R. § 550.58 and Federal Bureau of Prisons Program Statement 5162.04, (categorization of offenses) (Oct. 9, 1997). The regulations and the program statement identify two groups of offenses. The first consists of various federal offenses that the director of the BOP has determined to be "crimes of violence"; inmates convicted of these offenses are, by the terms of the statute, excluded from eligibility for the early-release incentive. *See* Federal Bureau of Prisons Program Statement 5162.04, §§ 1-2, §§ 5-6, § 9. The second is a group of crimes (called "director's discretion offenses") a conviction for which renders an inmate ineligible for the early-release incentive. *See* 28 C.F.R. § 550.58(a)(1)(iv), § 550.58(a)(1)(vi)(A), § 550.58(a)(1)(vi)(B), § 550.58(a)(1)(vi)(C), and Federal Bureau of Prisons Program Statement 5162.04, §§ 1-2, § 5, § 7, § 9. It is this second group of offenses that is at issue in this appeal.

The regulations pertaining to "director's discretion offenses" state, *inter alia*, that inmates convicted of "a felony ... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon" are not eligible for early release. *See* 28 C.F.R. § 550.58(a)(1)(vi)(B). Section 7 of the program statement identifies more particularly

the offenses that the director of the BOP has decided will preclude eligibility for early release. Relying on the regulations and the program statement, the BOP determined that the appellees were ineligible for the early-release incentive, either because they had been convicted of being a felon in possession of a firearm, or because they had received a sentencing enhancement under the federal sentencing guidelines for possession of a dangerous weapon during the commission of a federal drug offense.

In their petitions to the district court, the appellees contended that the BOP exceeded its statutory authority by categorically excluding inmates who were not convicted of violent offenses from eligibility for the early-release incentive. The district court granted the appellees' petitions, and the BOP and the warden appeal. We disagree.

We have previously recognized that 18 U.S.C. § 3621(e)(2) vests broad discretion in the BOP to determine which individuals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release. *See Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998), *cert. denied*, 118 S. Ct. 2376 (1998). The statute states only that the prison term of an inmate convicted of a nonviolent offense "*may* be reduced by the Bureau of Prisons" (emphasis added), *see* 18 U.S.C. § 3621(e)(2)(B). The language is discretionary and does not mandate that the BOP grant a sentence reduction to any particular inmate or class of inmates. *Cf. Morgan v. Rabun*, 128 F.3d 694, 699 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1809 (1998) (finding "may" language in state statute discretionary). Under the plain language of this statute, "[c]ommission of a 'nonviolent offense' makes a prisoner eligible for consideration but does not ... grant the boon he seeks. Eligibility is not entitlement." *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997).

Nor does the statute mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses. In fact, Congress expected the BOP to make early-release

determinations "based on criteria to be established and uniformly applied," H.R. Rep. No. 103-320 (section-by-section analysis), 1993 WL 537335 (Nov. 3, 1993). It is well settled, moreover, that where Congress has left a gap in a statute for an agency to fill, we defer to the agency's interpretation so long as it is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 866 (1984); *see also Love*, 133 F.3d at 1069.

The BOP chose to exercise the discretion granted to it under the statute by identifying additional categories of inmates who are ineligible for the early-release program because, although their offenses may be "nonviolent" within the meaning of the statute, their underlying conduct indicates that they pose a serious risk to public safety. We think that the BOP's decision to exclude these additional categories of inmates from eligibility represents a manifestly permissible construction of the statute and an appropriate exercise of the BOP's discretion.

The appellees contend that the BOP's current regulations and the program statement interpreting the relevant statutory language are contrary to our decision in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998). We disagree. In *Martin*, 133 F.3d at 1078, we examined the portion of the statute that limits eligibility for early release to nonviolent offenders, *see* 18 U.S.C. § 3621(e)(2)(B). In striking down an earlier set of regulations that attempted to interpret the statutory term "nonviolent offense," we held that the BOP must look to the offense of conviction, not to sentencing factors, in determining whether an offender was convicted of a "nonviolent offense" and thus eligible under the statute for the early-release incentive. *Martin*, 133 F.3d at 1079-81. We did not, however, address the question at issue in this appeal, namely, whether the BOP may, as an exercise of its discretion, *see* 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release. *Martin* is therefore of no relevance to the present case.

We conclude that the BOP acted within its authority in excluding the appellees from the early-release program under 18 U.S.C. § 3621(e)(2). We therefore reverse the district court's grant of the appellees' petitions, and remand with instructions to enter judgment consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX 2

FILED

JAN 06 1999

CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHRISTOPHER A. LOPEZ, Petitioner, -vs- RANDY J. DAVIS, Warden, Federal Prison Camp, FEDERAL BUREAU OF PRISONS, Respondents.	*	CIV 98-4223 MEMORANDUM OPINION AND ORDER

Introduction

Petitioner, Christopher A. Lopez, has filed a pro se habeas petition pursuant to 28 U.S.C. § 2241. Doc. 1.[1] Petitioner claims that he has been improperly classified by the Bureau of Prisons as ineligible for early release under 18 U.S.C. § 3621 (e)(2)(B). For the reasons stated below, the Court grants the petition and orders the BOP to re-evaluate Lopez for early release in accordance with this opinion.

Background

The Petitioner, Christopher A. Lopez, is currently serving a 72-month sentence for his conviction under 21 U.S.C. § 841 (a)(1) (possession with intent to distribute methamphetamine). At sentencing Lopez was assessed a two-level enhancement under the Federal Sentencing Guidelines for possession of a dangerous weapon under U.S.S.G. 2D1.1(b)(1). Petitioner argues that he should be classified as eligible for a one-year sentence reduction if he successfully completes the Residential Drug Abuse Program ("RDAP") pursuant to 18 U.S.C. § 3621 (e)(2)(B).

The Government concedes that Lopez has exhausted his administrative remedies; therefore, his claim is properly before this Court for adjudication. Doc. 6, ¶ 6.

[1]Randy J. Davis has been substituted for Al Herrera in this case as Randy J. Davis is the new Warden of the Federal Prison Camp in Yankton, South Dakota.

Discussion

As part of the Crime Control Act of 1990, Congress required the Bureau of Prisons to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621 (b). Then in 1994, to provide an incentive to federal prisoners to enroll in and complete the Bureau of Prisons' drug treatment programs, Congress authorized the Bureau to reduce by up to one year the sentences of certain prisoners under 18 U.S.C. § 3621 (e)(2)(B). This statute provides:

> (2) **Incentive for prisoners' successful completion of treatment program.** — . . .
> (B) **Period of custody.** — The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621 (e)(2)(B).

To interpret the statute, the BOP issued regulations in May 1995 defining "nonviolent offense" as the converse of crime of violence. 28 C.F.R. § 550.58 (1995). This 1995 regulation excluded from eligibility for early release under § 3621 (e)(2)(B) those inmates whose "current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924 (c)(3)." 28 C.F.R. § 550.58 (1995).[2] Section 924 (c)(3) defines a crime of violence as an offense that is a felony and that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

To implement this regulation, the BOP adopted Program Statement 5162.02, Definition of Term, "Crimes of Violence" (July 24, 1995). At paragraph 5, this program statement set out the

[2]An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligible for early release by a period not to exceed 12 months, in accordance with paragraph (a) of this section, . . . unless the inmate's current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924 (c)(3), or unless the inmate has a prior felony and/or state conviction for homicide, forcible rape, robbery or aggravated assault. 28 C.F.R. § 550.58 (1995).

statutory definition of "crime of violence" found in 18 U.S.C. § 924 (c)(3). At paragraph 9, the program statement states in part:

> Convictions for an offense listed below, [including possession of a listed chemical], . . . may or may not meet the crime of violence definition by involving the use, attempted use, or threatened use of force, or by presenting a substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offender Characteristics." This subsection references a particular United States Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Under this program statement, where an inmate was assessed two levels to his offense level for possession of a firearm under the Federal Sentencing Guidelines he was automatically classified as ineligible for early release, and his crime was regarded by the BOP as a crime of violence.

In Martin v. Gerlinski, 133 F.3d 1076 (8th Cir. 1998), the Eighth Circuit ruled that the BOP exceeded its authority by considering the firearm enhancement in determining a prisoner's eligibility for early release under 18 U.S.C. § 3621 (e)(2)(B). Id. at 1080-81. The court stated:

> [T]he operative word in 3621 (e)(2)(B) is 'convicted,' thus requiring the BOP to look to the offense of conviction itself to determine whether it meets the definition of a 'nonviolent offense'; § 3621 does not address sentencing or sentencing enhancement factors.

Id. at 1079. The Martin court went on to say, "[a]lthough we agree that the BOP has discretion to determine which offenses will be eligible for consideration, we cannot agree that the BOP may disregard the plain language of the statute which speaks only to those 'convicted' of a nonviolent offense." Id. at 1080.

In so holding, the Martin court rejected the reasoning of Venegas v. Henman, 126 F.3d 760, 763-65 (5th Cir. 1997), wherein the Fifth Circuit addressed whether the BOP had properly classified inmates convicted under 18 U.S.C. § 922 (g) (felon in possession of a firearm) and 21 U.S.C. § 841 (b)(1) (drug possession with intent to distribute) as ineligible for consideration for

early release under § 3621 (e)(2)(B). The Fifth Circuit held that "[t]he Bureau did not exceed its statutory authority by using its discretion to exclude from consideration for early release those prisoners convicted of possession of a weapon by a felon and offenses enhanced under the sentencing guidelines for possession of a weapon." Id. at 763. The Venegas court concluded that the operative words within section 3621 (e)(2)(B) are "may be reduced by the Bureau of Prisons," whereas the Eighth Circuit found that the statute requires the BOP to focus on the offense of conviction to establish eligibility for consideration for early release. Martin at 1080.

Prior to the Eighth Circuit's decision in Martin, on October 9, 1997, the BOP implemented the current regulations and program statement defining eligibility for the RDAP and early release. The regulatory section, 28 C.F.R. § 550.58, Considerations for Early Release, was amended to delete the reference to § 924 (c)(3) and its definition of crimes of violence. The amended regulation states, in part:

> As an exercise of the discretion vested in the Director of the Federal Bureau of prisons, the following categories of inmates are not eligible for early release: . . .
> (vi) Inmates whose current offense is a felony:
> (A) that has an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
> (B) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
> (C) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
> (D) that by its nature or conduct involves sexual abuse offenses committed upon children.

28 C.F.R. § 550.58.

Also on October 9, 1997, the BOP program statements were amended to reflect this change. A specific program statement called "Categorization of Offenses," Program Statement 5162.04, was added. Section seven lists the offenses that, in the Director's discretion, shall preclude an inmate from receiving certain BOP program benefits.[3] The list in section seven is the

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[3]Section 7 states in relevant part:

OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN

same as the above-quoted section of 28 C.F.R. § 550.58, Considerations for Early Release. This new program statement is applied to inmates either not participating in the RDAP as of October

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INMATE'S RECEIVING CERTAIN BUREAU PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621 (e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed in either this section or section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

Inmates whose current offense is a felony that:

- has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
- involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
- by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
- by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

b. Criminal Offense with a Specific Offense Characteristic Enhancement.

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Example: Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force my be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

e. Special Circumstances

- Title 18, United States Code § 922 (g). All offenses under 18 U.S.C. § 922 (g) shall preclude an inmate from receiving certain Bureau program benefits.

9, 1997 or those who had not completed the RDAP by October 9, 1997. Like the previous program statement, the new one categorically excludes inmates from eligibility for consideration based upon the assessment of a two point enhancement for weapon possession under the Federal Sentencing Guidelines.

Thus far, three Circuits have evaluated whether the BOP acted within its statutory authority in implementing the October 1997 regulation changes. The Sixth Circuit held that even though the BOP has eliminated the regulation's reliance on the meaning of "crime of violence" in § 924 (c), under the new rule, the BOP continues to deny eligibility to those prisoners who have been convicted of nonviolent offenses in violation of § 3621 (e)(2)(B). Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998). The court stated that "if the BOP cannot deny eligibility for consideration for early release to anyone who has committed a nonviolent offense, it can deny eligibility only to those who have committed a crime of violence." Id. at 655. Further, "the BOP cannot reasonablely refuse to consider those convicted as felons in possession for early release under 3621 (e)(2)(B)." Id. at 656. The other appellate courts that have considered this issue are the Fourth Circuit in Pelissero v. Thompson, 155 F.3d 470 (4th Cir. 1998) and the Seventh Circuit in Bush v. Pitzer, 133 F.3d 455 (7th Cir. 1997). Both the Pelissero and Bush courts, like the Venegas court, focused on the discretion afforded the BOP rather than on the elements of the offense of conviction as required by the Martin court. For example, in Pelissero the court stated:

> Congress entrusted the decision whether to grant inmates early release under 18 U.S.C. § 3621 (e)(2)(B) "solely to the discretion and expertise of the BOP, with a cautious eye toward the public safety and welfare." Pelissero, 955 F. Supp. at 637. In exercising this discretion, the Bureau of Prisons must balance Congress's twin goals of providing an incentive for drug-addicted prisoners to undergo treatment while at the same time protecting the public from potentially violent criminals. We think that the 1997 revised version of 28 C.F.R. § 550.58 constitutes a reasonable interpretation designed to effect this objective.

Id. at 476-77 (citing Bush at 458 (upholding 1997 revised regulation on grounds that Bureau of Prisons may rationally deny early release to prisoners whose underlying conduct is violent or prone to violence)).

While it is true that the BOP may exercise a great deal of discretion in determining who among the eligible nonviolent offenders may be released, the BOP may not, in the first instance,

exclude those convicted of nonviolent offenses from early release consideration.[4] Consistent with the Eighth Circuit's opinion in Martin and the Sixth Circuit's decision in Orr, it is the holding of this Court that the BOP has exceeded its authority by interpreting 18 U.S.C. § 3621 (e)(2)(B) in a manner inconsistent with the plain language of the statute. The 1997 revised program statement does not correct the problems the Eighth Circuit found in the 1995 version because the BOP continues to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release under section 3621 (e)(2)(B). Both the former and revised program statements allow the BOP to categorically exclude inmates from consideration based upon sentencing factors or weapon possession, without regard to whether the underlying conviction was nonviolent.

At least two other district courts have held similarly. See Hicks v. Brooks, ---F. Supp.2d---, 1998 WL 817828 (D. Colo.); Gavis v. Crabtree, ---F. Supp.2d---, 1998 WL 842934 (D. Or.). In Hicks, the court explained:

> [i]n effect, the BOP has eliminated the definition of crime of violence from the 1997 revised regulation and incorporated into the revised regulation the language of the sentence enhancement for possession of a firearm, language that previously was in Program Statement 5162.02. By doing so, the BOP again has accomplished precisely what [the Tenth Circuit] said it may not, i.e., exclude categorically from consideration for early release upon completion of a drug treatment program those inmates convicted of a nonviolent offense who sentence was enhanced for possession of a weapon and, once again, convert a conviction for a nonviolent offense into a violent one by considering the sentence enhancement.

Id. at *5.

Although 18 U.S.C. § 3621 (e)(2)(B) does allow the BOP to exercise discretion to determine who, among the statutorily eligible inmates, should be granted early release, it cannot exercise its discretion to deny recognition of eligibility to those inmates statutorily eligible for consideration. In the first instance, under the language of § 3621 (e)(2)(B), Martin, and Orr, inmates convicted of nonviolent offenses must be deemed eligible for consideration for a sentence

[4]As stated by the Eighth Circuit in Martin, the Court has jurisdiction to review whether the BOP exceeded its statutory authority although the Court may not review the BOP's discretionary decision to deny a sentencing reduction. Id. at 1079 (citing Wajda v. United States, 64 F.3d 385, 388 (8th Cir. 1995) (court retains jurisdiction to determine whether Parole Commission exceeded statutory authority notwithstanding lack of jurisdiction to review substantive decision)).

reduction. The exercise of discretion requires a careful consideration of each individual case. A categorical denial of all cases within one general group without individual examination is no exercise of discretion at all.

Conclusion

Based upon the foregoing analysis, the Court grants the petition and orders the BOP to reconsider Lopez's eligibility for early release in accordance with this opinion. Accordingly,

IT IS ORDERED:

(1) that the petition filed by Christopher A. Lopez is granted.

(2) that the BOP will reconsider the eligibility of Christopher A. Lopez for early release under 18 U.S.C. § 3621 (e)(2)(B) in accordance with this opinion.

Dated this 6th day of January, 1999.

BY THE COURT:

Lawrence L. Piersol

Chief Judge

ATTEST:

JOSEPH HAAS, CLERK

BY: Sharon Soard

(SEAL) DEPUTY

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-1203/1204/1205/1206/1207/1211/1212/1213/1214/1611SDSF

Calvin Bellis, et al.,

Appellees,

v.

Randa J. Davis, et al.,

Appellants.

Appeal from the United States District Court for the District of South Dakota

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 16, 1999

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX 4

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[See main volume for text of (i)]

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

[See main volume for text of (l) and (m)]

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm—

APPENDIX 5

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any

such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed."; and

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

APPENDIX 9

SUBCHAPTER C—IMPRISONMENT

Sec.
3626. Appropriate remedies with respect to prison conditions.

HISTORICAL AND STATUTORY NOTES

Codification

Amendment by Pub.L. 104–134, Title I, § 101[(a)][Title VIII, § 802(c)], Apr. 26, 1996, 110 Stat. 1321–70; renumbered Title I Pub.L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1227, which directed that subchapter C analysis be amended, was executed by making amendment to item 3626 as the probable intent of Congress.

1996 Amendments

Pub.L. 104–134, Title I, § 101[(a)][Title VIII, § 802(c)], Apr. 26, 1996, 110 Stat. 1321–70; renumbered Title I Pub.L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1227, substituted "conditions" for "crowding" in item 3626. See Codification note under this section.

1994 Amendments

Pub.L. 103–322, Title XX, § 20409(c), Sept. 13, 1994, 108 Stat. 1828, added item 3626.

Pub.L. 103–322, Title XXXIII, § 330010(3), Sept. 13, 1994, 108 Stat. 2143, directed that the analysis of sections be moved to a position below the subchapter heading. The amendment served to correct a technical error in Pub.L. 98–473 which, in enacting this subchapter, had placed the analysis above the subchapter heading.

§ 3621. Imprisonment of a convicted person

[See main volume for text of (a)]

(b) Place of imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

[See main volume for text of (1) to (5)]

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

[See main volume for text of (c) and (d)]

(e) Substance abuse treatment.—

(1) Phase-in.—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)—

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) Incentive for prisoners' successful completion of treatment program.—

(A) Generally.—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau

deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

(3) Report.—The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain—

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible; and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

(4) Authorization of appropriations.—There are authorized to be appropriated to carry out this subsection—

(A) $13,500,000 for fiscal year 1996;

(B) $18,900,000 for fiscal year 1997;

(C) $25,200,000 for fiscal year 1998;

(D) $27,000,000 for fiscal year 1999; and

(E) $27,900,000 for fiscal year 2000.

(5) Definitions.—As used in this subsection—

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set apart from the general prison population—

(i) directed at the substance abuse problems of the prisoner; and

(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems;

(B) the term "eligible prisoner" means a prisoner who is—

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program; and

(C) the term "aftercare" means placement, case management and monitoring of the participant in a community-based substance abuse treatment program when the participant leaves the custody of the Bureau of Prisons.

(6) Coordination of Federal assistance.—The Bureau of Prisons shall consult with the Department of Health and Human Services concerning substance abuse treatment and related services and the incorporation of applicable components of existing comprehensive approaches including relapse prevention and aftercare services.

(As amended Pub.L. 101–647, Title XXIX, § 2903, Nov. 29, 1990, 104 Stat. 4913; Pub.L. 103–322, Title II, § 20401, Title III, § 32001, Sept. 13, 1994, 108 Stat. 1824, 1896.)

HISTORICAL AND STATUTORY NOTES

1994 Amendments

Subsec. (b). Pub.L. 103–322, § 32001(1), deleted ", to the extent practicable," following "The Bureau shall" in the second sentence of the provisions following par. (5).

Pub.L. 103–322, § 20401, inserted at the end of the provisions following par. (5) the following new sentence: "In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status."

Subsec. (e). Pub.L. 103–322, § 32001(2), added subsec. (e).

1990 Amendment

Subsec. (b). Pub.L. 101–647 added provision respecting drug treatment for prisoners.

APPENDIX 7

Withdrawal/expulsion. (1) An in-
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ted to the program. Ordinarily,
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Committed a 100 level prohibited

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984, May 25, 1995]

**Incentives for residential drug
e treatment program participa-**

inmate may receive incentives
or her satisfactory involvement
residential program. These in-
may include, but are not lim-
the following.
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rovided the inmate is otherwise
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entives previously achieved.

, May 25, 1995]

§550.58 Consideration for early release.

Except as provided in this paragraph, an inmate who was sentenced to a term of imprisonment pursuant to the provisions of 18 U.S.C. chapter 227, subchapter D, and who completes a residential drug abuse treatment program including subsequent transitional services in a community-based program (i.e., in a Community Corrections Center or on home confinement) during his or her current commitment may be eligible, in accordance with paragraph (a) of this section, for early release by a period not to exceed 12 months. The following categories of inmates are not eligible: INS detainees, pretrial inmates, contractual boarders (for example, D.C., State, or military inmates), inmates whose current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3), inmates who have a prior conviction for homicide, forcible rape, robbery, or aggravated assault, and inmates who are not eligible for participation in a community-based program as determined by the Warden on the basis of his or her professional discretion.

(a) *Eligibility.* (1) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:

(i) Staff confirm that the completed program matches the treatment required by statute;

(ii) The inmate signs an agreement acknowledging his/her program responsibility;

(iii) The inmate completes a refresher treatment program and all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(iv) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(2) An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if:

(i) The inmate completes all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(ii) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(b) *Application*—(1) *Inmates currently enrolled.* Eligible inmates currently enrolled in a residential drug abuse treatment program shall automatically be considered for early release.

(2) *Inmates who had previously completed program requirements.* Eligible inmates who have previously completed a residential drug abuse treatment program (or which matches the treatment required by statute) must notify the institution's drug abuse program coordinator via a Request to Staff in order to be considered for early release.

(c) *Length of reduction.* (1) Except as specified in paragraphs (c)(2) and (3) of this section, an inmate who is approved for early release may receive a reduction of up to 12 months.

(2) If the inmate has less than 12 months to serve after completion of all required transitional services, the amount of reduction may not exceed the amount of time left on service of sentence.

(3) If, based upon a disciplinary finding or based on program needs (for example, the inmate has not established an adequate release plan), the Community Corrections Regional Administrator may retard or disallow any portion of the maximum 12 months for an inmate in a community-based program.

[60 FR 27685, May 25, 1995, as amended at 61 FR 25122, May 17, 1996]

§550.59 Transitional drug treatment services.

Transitional treatment programming is required for all inmates completing an institution's residential treatment program. Transitional treatment includes treatment provided to inmates who, upon completing the residential program, return to the general population of that or another institution or who are transferred to a community-based program. An inmate's refusal to

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APPENDIX 8

(a) *Eligibility.* An inmate must meet all of the following criteria to be eligible for the residential drug abuse treatment program.

(1) The inmate must have a verifiable documented drug abuse problem.

(2) The inmate must have no serious mental impairment which would substantially interfere with or preclude full participation in the program.

(3) The inmate must sign an agreement acknowledging his/her program responsibility.

(4) Ordinarily, the inmate must be within thirty-six months of release.

(5) The security level of the residential program institution must be appropriate for the inmate.

(b) *Application/Referral/Placement.* Participation in the residential drug abuse treatment program is voluntary. An inmate may be referred for treatment by unit or drug treatment staff or apply for the program by submitting a request to a staff member (ordinarily, a member of the inmate's unit team or the drug abuse treatment coordinator). The decision on placement is made by the drug abuse treatment coordinator.

(c) *Completion.* Completion of the residential drug abuse treatment program requires attendance and participation in scheduled individual and group activities and a passing grade on examinations covering each separate subject module of the program. An inmate who fails an examination on any subject module ordinarily shall be allowed to retest one time. A certificate of achievement will be awarded to all who successfully complete the program. A copy of this certificate will be forwarded to the unit team for placement in the inmate's central file.

(d) *Withdrawal/expulsion.* (1) An inmate may withdraw voluntarily from the program.

(2) The drug abuse treatment coordinator may remove an inmate from the program based upon disruptive behavior related to the program. Ordinarily, staff shall provide the inmate with at least one warning prior to removal. An inmate may not ordinarily be removed immediately without warning unless the inmate, pursuant to an incident report, is found by the DHO to have:

(i) Used or possessed alcohol or drugs;

(ii) Been violent or threatened violence against staff or another inmate; or

(iii) Committed a 100 level prohibited act.

(3) Withdrawal or removal from the residential program may result in the inmate's being returned to his/her prior institution (when the inmate had been specifically transferred for the purpose of program participation).

[60 FR 27694, May 25, 1995]

§ 550.57 Incentives for residential drug abuse treatment program participation.

(a) An inmate may receive incentives for his or her satisfactory involvement in the residential program. These incentives may include, but are not limited to, the following.

(1) Limited financial awards, based upon the inmate's achievement/completion of program phases.

(2) Consideration for the maximum period of time (currently 180 days) in a Community Corrections Center placement, provided the inmate is otherwise eligible for this designation.

(3) Local institution incentives such as preferred living quarters or special recognition privileges.

(4) If eligible under § 550.58, consideration for early release.

(b) An inmate must meet his/her financial program responsibility obligations (see 28 CFR part 545) prior to being able to receive an incentive for his/her residential program participation.

(c) Withdrawal or removal from the residential program may result in the loss of incentives previously achieved.

[60 FR 27694, May 25, 1995]

§ 550.58 Consideration for early release.

An inmate who was sentenced to a term of imprisonment pursuant to the provisions of 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense, and who is determined to have a substance abuse problem, and successfully completes a residential drug abuse treatment program during his or her current commitment may be eligible, in accordance with paragraph (a) of this section, for early release by a period not to exceed 12 months.

(a) *Additional early release criteria.* (1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:

(i) INS detainees;

(ii) Pretrial inmates;

(iii) Contractual boarders (for example, D.C., State, or military inmates);

(iv) Inmates who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses;

(v) Inmates who are not eligible for participation in a community-based program as determined by the Warden on the basis of his or her professional discretion;

(vi) Inmates whose current offense is a felony:

(A) That has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

(B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

(C) That by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

(D) That by its nature or conduct involves sexual abuse offenses committed upon children.

(2) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:

(i) Staff confirm that the completed program matches the treatment required by statute;

(ii) The inmate signs an agreement acknowledging his/her program responsibility;

(iii) The inmate completes a refresher treatment program and all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(iv) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(3) An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if:

(i) The inmate completes all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(ii) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(b) *Application*—(1) *Inmates currently enrolled.* Eligible inmates currently enrolled in a residential drug abuse treatment program shall automatically be considered for early release.

(2) *Inmates who had previously completed program requirements.* Eligible inmates who have previously completed a residential drug abuse treatment program (or which matches the treatment required by statute) must notify the institution's drug abuse program coordinator via a Request to Staff in order to be considered for early release.

(c) *Length of reduction.* (1) Except as specified in paragraphs (c)(2) and (3) of this section, an inmate who is approved for early release may receive a reduction of up to 12 months.

(2) If the inmate has less than 12 months to serve after completion of all required transitional services, the amount of reduction may not exceed the amount of time left on service of sentence.

(3) If the inmate cannot fulfill his or her community-based treatment obligations by the presumptive release date, the Community Corrections Regional Administrator may adjust the presumptive release date by the minimum amount of time necessary to allow for fulfillment of the treatment obligations.

[60 FR 27695, May 25, 1995, as amended at 61 FR 25122, May 17, 1996; 62 FR 53081, Oct. 15, 1997]

APPENDIX 9

OPI: OGC
NUMBER: 5162.02
DATE: July 24, 1995
SUBJECT: Definition of Term, "Crimes of Violence"

1. PURPOSE AND SCOPE. To implement various portions of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) that make reference to "nonviolent offense," and "crime of violence," specifically, Section 20417, Notification of Release of Prisoners, Section 20405, Crediting of "Good Time," and Section 32001, Substance Abuse Treatment in Federal Prisons. This Program Statement defines "crime of violence" as that term is used in these sections of the VCCLEA. The definition includes broad statutory language, as well as a framework for determining which specific criminal offenses fall within the statutory definition.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. An inmate whose offense is a crime of violence will have that status reflected in his or her record and be subject to the limitations imposed by that status.

b. Case management staff will review relevant documents to determine whether an inmate has committed a crime of violence.

3. DIRECTIVES REFERENCED

P.S. 5322.09 Classification and Program Review of Inmates (03/10/94)
P.S. 5330.10 Drug Abuse Programs Manual, Inmate (05/25/95)
P.S. 5800.07 Inmate Systems Management Manual (12/24/91)
P.S. 5800.08 Receiving and Discharge Manual (06/15/93)
P.S. 5880.28 Sentence Computation Manual (CCCA of 1984) (02/21/92)
P.S. 5880.30 Sentence Computation Manual (Old Law, Pre-CCCA of 1984) (07/16/93)

4. STANDARDS REFERENCED. None.

5. STATUTORY DEFINITION. Title 18 of the United States Code defines "crime of violence" in Section 924(c)(3) as follows:

" The term 'crime of violence' means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

6. CRIMINAL PROVISIONS OF THE UNITED STATES CODE. Criminal offenses are defined in many different titles of the United States Code including Titles 7, 16, 18, 21, 26, 29, 30, and 46. The

offenses contained within these titles that may be crimes of violence are listed in the various sections below. If a particular code section in these titles is not listed below, and case management staff believe that the crime might be violent, they should contact Regional Counsel. Additionally, if a Judgment and Commitment Order references a United States Code section that is not found in Titles 7, 16, 18, 21, 26, 30, 42, or 49, please contact Regional Counsel to determine whether the particular offense should be categorized as a "crime of violence."

Some of the Code sections may be listed in more than one section below; this duplication is indicated by an asterisk. In such cases, staff should check subsequent sections of the Program Statement to determine whether the offense is a "crime of violence."

7. CRIMINAL OFFENSES THAT ARE CRIMES OF VIOLENCE IN ALL CASES. Any conviction for an offense listed below should be categorized as a "crime of violence."

a. Title 18, United State Code Sections

§ 32 (destruction of aircraft)
§ 34 (penalty when death results)
§ 35(b) (conveying false information that harms human life)
§ 36 VCCLEA addition (firing weapons into group of persons)
§ 37 VCCLEA addition (violence at international airports)
§ 43(b) (animal enterprise terrorism causing death or injury)
§ 81 (arson w/in maritime jurisdiction)
§ 111 (assaulting officers of the United States)
§ 112(a) (assaulting foreign officials)

§ 113 (assaults w/in maritime jurisdictions)
§ 114 (maiming w/in maritime jurisdiction)
§ 115 (threatening family member of a federal official)
§ 175 (biological weapons)
§ 231 (civil disorders)
§ 245 (federally protected activities)
§ 247(a)(1) (damage to religious property/obstruction of exercise of religion)
§ 247(a)(2) (obstruction of persons in free exercise of religion)
§ 351 (assassination of cabinet and congress members)
§ 373 (soliciting to commit a violent act)
§ 753 (rescue of an inmate to prevent execution)
* § 842 (explosive materials) *
§ 844 (penalties)
§ 871 (threats against the President)
§ 875(a),(b),(c) (interstate communications)
§ 878 (threats against foreign officials)
§ 879 (threats against former presidents)
* § 922(a)(4), (a)(7), (a)(8), (b)(4), (b)(5), * (d)(1), (d)(2), (d)(4), (d)(8), (g),(o),(p) (firearms violations)
§ 924(c) (firearms used in violent or drug trafficking crimes)

§ 930(b) & (c) (possession of firearms in federal facilities)
§ 970(a) (damage of property owned by foreign governments)
§ 1091 (genocide)
§ 1111 (murder)
§ 1112 (manslaughter)
§ 1113 (attempt to commit murder or manslaughter)
§ 1114 (murder of officers)
§ 1116 (murder of foreign officials)
§ 1117 (conspiracy to murder)
§ 1118 VCCLEA addition (murder in correctional institution)
§ 1119 VCCLEA addition (foreign murder of US national)
§ 1120 VCCLEA addition (murder by escaped prisoner)
§ 1121 VCCLEA addition (murder by state or local officer)
§ 1201 (kidnapping)
§ 1203 (hostage taking)
§ 1204 (international parental kidnapping)
§ 1364 (interference by foreign commerce by violence)
§ 1365 (tampering with consumer products) except 1365(b),(c)
§ 1512(a) (killing witness or victim)
§ 1513 (retaliation against witness or victim)
§ 1581 (peonage)

§ 1583 (enticement into slavery)
§ 1584 (sale into servitude)
§ 1585 (slave trading)
§ 1587 (possession of slaves aboard a vessel)
§ 1588 (transporting slaves)
§ 1651 (piracy)
§ 1652 (citizens as pirates)
§ 1653 (aliens as pirates)
§ 1655 (assault on commander as pirates)
§ 1659 (attack to plunder a vessel)
§ 1661 (robbery ashore)
§ 1751 (assassination of president or staff)
§ 1792 (mutiny or riot)
§ 1859 (surveys interrupted)
§ 1864 (hazardous devices on federal lands)
§ 1958 (use of interstate commerce in murder for hire)
§ 1959 (violent crimes aiding racketeering)
§ 1991 (entering train to commit crime)
§ 1992 (wrecking trains)
§ 2101 (riots)
§ 2111 (special maritime jurisdiction)
§ 2113(d),(e) (bank robbery and incidental crimes)
§ 2114 (assault of person carrying mail)
§ 2115 (breaking into post office)

§ 2118(a),(b),(c) (robberies and burglaries involving controlled substances)
§ 2119 (crimes involving motor vehicles)
§ 2191 (cruelty to seamen)
§ 2231(b) (assault or resistance)
§ 2232(a) (destruction of property to prevent seizure)
§ 2233 (rescue of seized property)
§ 2241 (aggravated sexual abuse)
§ 2242 (sexual abuse)
§ 2244(a) (abusive sexual contact)
§ 2261 VCCLEA addition (interstate domestic violence)
§ 2275 (firing or tampering with vessels)
§ 2276 (breaking and entering vessels)
§ 2280 VCCLEA addition (violence against maritime navigation)
§ 2281(NOT (A)), VCCLEA addition (violence against fixed platforms)
§ 2332 (penalties for homicide)
§ 2332a VCCLEA addition (use of weapons of mass destruction)
§ 2340A (torture)
§ 2383 (rebellion or insurrection)
§ 2384 (sedition conspiracy)
§ 2385 (advocating the overthrow of the government)
§ 2389 (recruiting for service against U.S.)
§ 2390 (enlistment to serve against U.S.)

§ 2421 (transportation for illegal sexual activity)
§ 2422 (coercion into interstate travel for illegal sexual activity)
§ 2423 (transportation of minors for illegal sexual activity)

b. Title 21 United States Code Sections

* § 841(e) (boobytraps on federal property) *
§ 848(e) (death penalty for criminal offenses)
§ 858 (endangering human life while manufacturing controlled substances)

* c. Title 26 United States Code Sections *

§ 5861(a)-(l) (firearms)

d. Title 42 United States Code Sections

§ 2283(a) (protection of nuclear inspectors)
§ 2284(a) (sabotage of nuclear facilities)
§ 3631 (interference with housing)

e. Title 49 United States Code Sections

§ 46502 (aircraft piracy)

§ 46504 (interference with flight crew members)
§ 46505(c) (carrying a weapon on an aircraft)
§ 46507 (false information and threats)

8. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON THE BASE OFFENSE LEVEL ASSIGNED. Convictions for an offense listed below may or may not have involved the use, attempted use, or threat of force, or presented the substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if an offense listed below involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," subsection entitled "Base Offense Level." This subsection references a particular United States Sentencing Guideline provision that distinguishes between violations of the particular criminal code section that are committed with and without force.

Example: Title 18 United States Code Section 241, Conspiracy Against Rights provides:

If two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant . . .

. in the free exercise or enjoyment of any right or privilege . . . .

This crime could be committed through the use of force or threat of use of force, or not, since one can be oppressed through means other than force. Pursuant to United States Sentencing Guideline Section 2H2.1, if the crime involved obstructing an election or registration and the obstruction occurred using force or threat of force against persons or property, the base offense level is 18. If the obstruction occurred through non-violent means, such as forgery, fraud, theft, deceit, etc., the base offense level is 12. If an offender was convicted of an offense listed below, case management staff must examine the base offense level to determine whether the offense was a crime of violence. If the Presentence Investigation Report does not include an explanation as to the reason for assigning a particular base offense level, case management staff may need to examine the particular Sentencing Guideline referenced.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a base level adjustment for violence. Accordingly, it is possible that an examination of the Offense Computation section of the Presentence Investigation Report may reveal no mention of violence. When the Presentence Investigation Report fails to explain the reason for assigning a particular base offense level, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

A list of offenses for which the Sentencing Guidelines base offense level is affected by the presence of violence follows:

Title 18 United States Code Sections

§ 33 (destruction of motor vehicles or facilities)
§ 241 FOR OTHER THAN CONSPIRACY (conspiracy against rights)
§ 242 (deprivation of rights under color of law)
§ 592 (putting troops at polls)

§ 593 (interference by armed forces)
§ 1791 (possessing contraband in prison)
§ 1952 (transporting items in aid of racketeering)
§ *2116 (railway or steamboat post office)
§ 2231(a) (assault on persons executing search warrant)
§ 2381 (treason)

9. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON THE SPECIFIC OFFENSE CHARACTERISTIC ASSIGNED. Convictions for an offense listed below, like those listed in Section 8 above, may

or may not meet the crime of violence definition by involving the use, attempted use, or threatened use of force, or by presenting a substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offense Characteristics." This subsection references a particular United States Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

* Example: Section 841 of Title 21 United States Code makes it a* crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a dangerous weapon was possessed during commission of the offense, the court would increase the defendant's base offense level by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs (21 U.S.C. § 841), and receives a two level enhancement for possession of a firearm has been convicted* of a "crime of violence." *

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a Specific Offense Characteristic for violence. Alternatively, the Presentence Investigation Report may fail to adequately describe the Specific Offense Characteristic that underlies the increase in offense level. In either case, it is possible that an examination of the Offense Computation section of the Presentence Investigation Report reveals no mention of violence. If this occurs, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Example: The Presentence Investigation Report in the above scenario may state "SOC (specific offense characteristic) 2F1.1(4) increase 2 levels." If the Report does not further state "since the offense involved the conscious or reckless risk of serious bodily injury, increase by two levels pursuant to 2F1.1(4)," the case management staff may have to examine Guideline 2F1.1(4) to determine that the only basis for this particular increase is a finding that the offense included the risk of bodily injury.

Case management staff may contact Regional Counsel if they have questions regarding this section. Below is a list of offenses for which there could be a Specific Offense Characteristic enhancement for the use of violence:

a. Title 16 United States Code Sections

§ 773e(a)(2),(3),(4),(6) (violation of Northern Pacific Halibut Act)
§ 773g (violation of Northern Pacific Halibut Act)
§ 1857(a)(D),(E),(F),(H) (violation of National Fishery Management Program)
§ 1859 (violation of National Fishery Management Program)
§ 2435(4),(5),(6),(7) (violation of Antarctic Marine Living Resources Convention)
§ 2438 (violation of Antarctic Marine Living Resources Convention)
§ 3606 (violation of North Atlantic Salmon Fishing)
§ 3637(a)(2),(3),(4),(6),(c) (violation of Pacific Salmon Fishing)
§ 5009(5),(6),(7),(8) (violation of North Pacific Anadromous Stock Convention)
§ 5010(b) (violation of North Pacific Anadromous Stock Convention)

b. Title 18 United States Code Sections

§ 755 (officer permitting escape)
§ 757 (procures escape for prisoner of war)
§ 874 (kickbacks from public works employees)
§ 894 (extending credit through extortionate means)
§ 1163 (embezzlement/theft from Indian organizations)
§ 1503 (influencing or injuring officer or juror)
§ 1505 (obstruction of proceedings before departments or agencies)
§ 1511 (obstruction of state or local law enforcement)
§ 1516 (obstruction of a federal audit)
§ 1517 (obstructing financial examination)
§ 1951 (interference with commerce by threats or violence)
§ 2112 (robbery of personal property of United States)
§ *2116 (breaking into a mail car)

c. Title 21 United States Code Sections

§ 841(NOT (e)), (controlled substance violation)
§ *846 (attempt and conspiracy)

d. Title 26 United States Code Sections

§ 7212 (attempt to interfere with revenue laws)
§ 7214 (unlawful acts by employees of the IRS)

e. Title 30 United States Code Sections

§ 1461(a)(3),(4),(5),(7) (resisting officers for violations under Deep Seabed Mineral Resources Act)
§ 1463 (violations of Deep Seabed Mineral Resources Act)

f. Title 33 United States Code Section

§ 1232(b)(2) (ports and waterways safety enforcement provisions)

g. Title 40 United States Code Section

§ 193f(a) (security of Capitol grounds and buildings)

h. Title 42 United States Code Sections

§ 1973aa (application of prohibition to other States)
§ 1973aa-1 (residence requirements for voting)
§ 1973aa-1a (bilingual election requirements)
§ 1973aa-3 (penalty)
§ 1973bb (enforcement of twenty-sixth amendment)
§ 1973gg-10 (criminal penalties)
§ 2283(b) (protection of nuclear inspectors)
§ 19151(2),(3),(4),(5) (violation of Ocean Thermal Energy Conversion Act)
§ 9152(d) (violation of Ocean Thermal Energy Conversion Act)

i. Title 46 United States Code Section

§ 1903 (Manufacture, Distribution, or possession with intent to manufacture controlled substances)

j. Title 49 United States Code Section

§ 46505(b) (carrying a weapon on an aircraft)

10. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON A VARIETY OF FACTORS. In addition to the two lists in Sections 8 and 9 above, there are several more code sections that can be violated with or without force. For the crimes listed below, the Sentencing Guidelines provide little insight into the court's findings on this issue. Accordingly, rather than simply examining the base offense level or the specific

offense characteristics, case managers must carefully examine the entire Offense Computation section of the Presentence Investigation Report, and, if necessary, the Offense Conduct section, to determine whether the offense was violent.

For the sections listed below, staff should look carefully to see if the offense was committed through the use or threatened use of force against a person or property, or whether commission of the offense involved a substantial risk that force would be used against a person or property.

* Some of the statutes listed in this section cover conspiracy* offenses, (see, e.g., 18 U.S.C. § 371 and 21 U.S.C. § 846) where an individual has planned with others to commit a particular crime. Other listed statutes cover attempt offenses (see, e.g., 21 U.S.C. §§ 846 and 963) where an individual tried but did not succeed in committing a particular crime. In order to determine whether one these offenses is violent, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense would be classified as violent pursuant to the provisions of this program statement, e.g., murder, then the attempt or the conspiracy offense is also violent. The underlying offense may be noted on the Judgment and Commitment Order and will certainly be included in the Presentence Investigation Report.

Example: The Judgment and Commitment Order may indicate a conviction for "Attempt and Conspiracy)" (21 U.S.C. § 846). The accompanying Presentence Investigation Report will reference the underlying crime, in many cases it will be "Possession with Intent to Distribute a Controlled Substance" (21 U.S.C. § 841). Staff should then review the underlying offense (in this case possession of controlled substance) using the categories in this program statement. As noted in the example on Section 9, if the Presentence Report indicates that the defendant received a 2 level increase for possessing a dangerous weapon ("Specific Offense Characteristic" for guideline § 2D1.1 or 2D1.11 applicable to 21 U.S.C. § 841 violations), then the offense should be deemed violent; if no such enhancement was given, the offense should be deemed nonviolent.

There are some statutes that do not criminalize behavior, but rather set out penalties that will result from violating other statutes.

Example: 18 U.S.C. § 924(a)(1)(B) provides that whoever "knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922 . . . shall be fined under

this title, imprisoned not more than five years, or both."

The Judgment and Commitment Order may indicate the sentence was imposed pursuant to the penalty provisions of § 924(a)(1)(B) without indicating the conviction for the underlying offense. The PSI, however, will note the underlying conviction, e.g., "Transporting a Destructive Device in Interstate Commerce" (18 U.S.C. § 922(a)(4)). In order to determine whether the offender's current offense is violent, staff should assess whether the underlying offense is violent in accordance with the provisions of this policy; if the underlying offense is violent, then the offender * should be deemed violent. *

Below is a list of offenses that may be violent depending on a variety of factors.

a. Title 7 United States Code Section

§ 473c-1 (offenses in relation to sampling of cotton)

b. Title 16 United States Code Sections

§ 5106(e)(5),(6),(7),(9),(f)(2) (violation of Atlantic Coast Fisheries Cooperative Management)

c. Title 18 United States Code Sections

§ 241 if conspiracy (conspiracy to deprive of civil rights)
§ 371 (conspiracy to commit offense or fraud against United States)
§ 372 (conspiracy to impede or inure officer)
§ 700 (desecration of the flag of the United States)
§ 751 (escape from federal prison)
§ 752 (instigating or assisting escape from federal prison)
§ 831 (prohibited acts involving nuclear materials)
§ 876 (mailing threatening communications)
§ 877 (mailing threatening communications from foreign country)
§ 924 (penalties for firearms violations)
§ 1153 (offenses within Indian Country)
§ 1512(b) (tampering with a witness/victim/informant)
§ 1708 (theft or receipt of stolen mail)
§ 1792 (mutiny and riot in prison)
§ 1956 (money laundering)
§ 1962 (racketeering)
§ 2117 (breaking into carrier facilities)
§ 2118(d) (robberies involving controlled substances)

§ 2152 (destruction of submarine and torpedo works)
§ 2153 (destruction of war materials)
§ 2154 (production of defective war material)
§ 2155 (destruction of national defense materials)
§ 2156 (production of defective national defense material)
§ 2192 (incitation of seamen to revolt)
§ 2193 (mutiny)
§ 2247 (repeat offenders)
§ 2387 (activities involving armed forces)

d. Title 21 United States Code Sections

§ *846 (attempt and conspiracy)
§ 848 (controlled substances violations as criminal enterprise)
§ 963 (conspiracy or attempt to violate controlled substance laws)

e. Title 40 United States Code Sections

§ 193f(a),(b) (security of Capitol grounds and buildings)

f. Title 42 United States Code Section

§ 2000(e)(13) (killing of officer while enforcing Equal Employment Act)

11. TITLE 18 UNITED STATES CODE SECTION 2113(a).

Title 18 United States Code Section 2113(a) provides in pertinent part:

Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association, . . . shall be fined under this title or imprisoned not more than twenty years, or both.

This statute covers various offenses, including not only bank robbery, but embezzling bank funds, stealing bank property and bank larceny.

With regard to the specific crime of bank robbery, the offense should be considered a crime of violence pursuant to section 924(c)(3) since, due to the circumstances surrounding bank robberies, the offense involves an explicit or implicit threat of force and thus has as an element the "threatened use of physical force against the person or property of another."

However, as to other offenses covered by 18 U.S.C. § 2113(a), (e.g. bank larceny), similar to offenses in Section 9, defendants may receive a Specific Offense Characteristic enhancement that will result in an increase in the base offense level. Such enhancements provide for an increase in the defendant's base offense level if a firearm was discharged, if a firearm or other dangerous weapon was brandished, displayed, possessed or used or if an express or implied threat of death was made (U.S.S.G. 2B3.2(b), Application Notes 2 and 6). If a defendant received such an enhancement (or one of the other enhancements involving violence), the crime should be deemed "violent."

12. OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987. The Sentencing Guidelines are, generally, not applicable for offenses committed before November 1, 1987. Accordingly, for offenses identified in sections 8 through 10 above that were committed before this date, case managers must make their own determination, based on the narrative description of the crime contained in the Presentence Investigation Report, whether the crime has as an element the use of force or threat of force, or the offense, by its nature, posed a substantial risk that force would be used (see definition in 18 U.S.C. § 924(c)(3) quoted above).

13. CRIMES CODIFIED PURSUANT TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994. The VCCLEA created a number of new Federal criminal offenses and enhanced penalties for several existing offenses. Some of the new offenses are included in the above lists, but the lists will be revised as needed after the United States Sentencing Commission drafts new guidelines. The above lists will be updated periodically to reflect legislative changes.

\s\
Kathleen M. Hawk
Director

APPENDIX 10

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI: OGC
NUMBER: 5162.04
DATE: October 9, 1997
SUBJECT: Categorization of Offenses

1. PURPOSE AND SCOPE. To assist in the implementation of various Federal Bureau of Prisons policies and programs. Section 6 of this Program Statement lists offenses the Bureau categorizes as crimes of violence as that term is used in various statutes. In addition, Section 7 lists offenses that in the Director's discretion shall preclude an inmate's receiving certain Bureau program benefits.

2. PROGRAM OBJECTIVE. The expected result of this program is: An inmate will be denied the benefits of certain programs if his or her offense is either a crime of violence or an offense identified at the discretion of the Director of the Bureau of Prisons.

3. DIRECTIVES AFFECTED

a. Directive Rescinded

OM 149-96 (5162)	Release Procedures for Inmates Eligible for Sentence Reduction Under 18 U.S.C. § 3621(e) in the Ninth Circuit (12/24/96)

b. Directives Referenced

PS 5110.11	Notification of Release to State and Local Law Enforcement Officials (10/31/95)
PS 5162.02	Definition of Term, Crimes of Violence (7/24/95)

PS 5322.09	Classification and Program Review of Inmates (3/10/94)
PS 5330.10	Drug Abuse Programs Manual, Inmate (5/25/95)
PS 5390.07	Intensive Confinement Center Program (4/24/96)
PS 5800.07	Inmate Systems Management Manual (12/24/91)
PS 5800.08	Receiving and Discharge Manual (6/15/93)
PS 5880.28	Sentence Computation Manual (CCCA of 1984) (2/21/92)
PS 5880.30	Sentence Computation Manual (Old Law, Pre-CCCA of 1984) (7/16/93)

4. STANDARDS REFERENCED. None.

5. APPLICATION. Criminal offenses are defined in many different titles of the United States Code including Titles 7, 16, 18, 21, 26, 29, 30, and 46. The offenses contained in these titles that may be crimes of violence are listed in Section 6. Section 7 lists offenses that are not categorized as crimes of violence, but would nevertheless preclude an inmate's receiving certain Bureau program benefits at the Director's discretion.

Some Bureau policies or programs require a determination that an inmate committed a crime of violence, for example, the Program Statement on Inmate Discipline and Special Housing Units. Other policies or programs, such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, indicate that an inmate may be denied the benefits of such programs if he or she was convicted of an offense listed in either Section 6 or 7. When an inmate may be denied a program benefit under either Section 6 or 7, staff must carefully explain the basis for the denial. For example, if an inmate is convicted of an offense listed in Section 7, the inmate should be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

If a particular Code section in these titles is not listed in Section 6 or Section 7, and case management staff believe the crime might be violent, or might preclude an inmate's receiving certain Bureau program benefits, they shall contact legal staff at the institution or the Regional Counsel. Also, if a Judgment and Commitment Order (J&C) references a United States Code section that is not found in Titles 7, 16, 18, 21, 26, 30, 42, or 49, they should contact legal staff at the institution or the

Regional Counsel to determine whether a recommendation should be made to change the policy to incorporate the offense in question.

Some of the Code sections may be listed in more than one section below; such duplication is indicated by an asterisk. In such cases, staff are to check subsequent sections of the Program Statement to determine whether the offense is a crime of violence or an offense that would otherwise preclude an inmate's receiving certain Bureau program benefits.

6. OFFENSES CATEGORIZED AS CRIMES OF VIOLENCE

a. Criminal Offenses That are Crimes of Violence in **All Cases**. Some Bureau policies or programs require a determination that an inmate committed a crime of violence, for example, the Program Statement on Inmate Discipline and Special Housing Units. Other policies or programs, such as early release pursuant to 18 U.S.C. § 3621(e), indicate that an inmate could be denied the benefits of such programs if he or she was convicted of an offense listed in either Section 6 or 7.

All Cases

Any conviction for an offense listed below is categorized as a crime of violence.

(1) Title 18, United State Code Sections

♦ 32	destruction of aircraft
♦ 34	penalty when death results
♦ 35(b)	conveying false information that harms human life
♦ 36	firing weapons into group of persons **(VCCLEA addition)**
♦ 37	violence at international airports **(VCCLEA addition)**
♦ 43(b)	animal enterprise terrorism causing death or injury
♦ 81	arson w/in maritime jurisdiction
♦ 111	assaulting officers of the United States
♦ 112(a)	assaulting foreign officials
♦ 113	assaults w/in maritime jurisdictions
♦ 114	maiming w/in maritime jurisdiction
♦ 115	threatening family member of a federal official

♦ 175	biological weapons
♦ 231	civil disorders
♦ 245	federally protected activities
♦ 247(a)(1)	damage to religious property/obstruction of exercise of religion
♦ 247(a)(2)	obstruction of persons in free exercise of religion
♦ 351	assassination of cabinet and congress members
♦ 373	soliciting to commit a violent act
♦ 753	rescue of an inmate to prevent execution
♦ 842	explosive materials
♦ 844	penalties
♦ 871	threats against the President
♦ 875(a),(b),(c)	interstate communications
♦ 878	threats against foreign officials
♦ 879	threats against former presidents
♦ 922(a)(4),(a)(7),(a)(8),(b)(4),(b)(5),(d)(1),(d)(2),(d)(4),(d)(8),(o),(p)	firearms violations
♦ 924(c)	firearms used in violent or drug trafficking crimes
♦ 930(b)&(c)	possession of firearms in federal facilities
♦ 970(a)	damage of property owned by foreign governments
♦ 1091	genocide
♦ 1111	murder
♦ 1112	manslaughter
♦ 1113	attempt to commit murder or manslaughter
♦ 1114	murder of officers
♦ 1116	murder of foreign officials
♦ 1117	(conspiracy to murder)
♦ 1118	murder in correctional institution **(VCCLEA addition)**
♦ 1119	foreign murder of US national **(VCCLEA addition)**
♦ 1120	murder by escaped prisoner **(VCCLEA addition)**
♦ 1121	murder by state or local officer **(VCCLEA addition)**

♦ 1201 kidnapping

♦	1203	hostage taking
♦	1204	international parental kidnapping
♦	1364	interference by foreign commerce by violence
♦	1365	tampering with consumer products **except** 1365(b),(c)
♦	1512(a)	killing witness or victim
♦	1513	retaliation against witness or victim
♦	1581	peonage
♦	1583	enticement into slavery
♦	1584	sale into servitude
♦	1585	slave trading
♦	1587	possession of slaves aboard a vessel
♦	1588	transporting slaves
♦	1651	piracy
♦	1652	citizens as pirates
♦	1653	aliens as pirates
♦	1655	assault on commander as pirates
♦	1659	attack to plunder a vessel
♦	1661	robbery ashore
♦	1751	assassination of president or staff
♦	1792	mutiny or riot
♦	1859	surveys interrupted
♦	1864	hazardous devices on federal lands
♦	1958	use of interstate commerce in murder for hire
♦	1959	violent crimes aiding racketeering
♦	1991	entering train to commit crime
♦	1992	wrecking trains
♦	2101	riots
♦	2111	special maritime jurisdiction
♦	2113(d),(e)	bank robbery and incidental crimes
♦	2114	assault of person carrying mail
♦	2115	breaking into post office
♦	2118(a),(b),(c)	robberies and burglaries involving controlled substances
♦	2119	crimes involving motor vehicles
♦	2191	cruelty to seamen
♦	2231(b)	assault or resistance
♦	2232(a)	destruction of property to prevent seizure
♦	2233	rescue of seized property
♦	2241	aggravated sexual abuse
♦	2242	sexual abuse
♦	2244(a)	abusive sexual contact

♦	2245	sexual abuse resulting in death (VCCLEA addition)
♦	2261	interstate domestic violence (VCCLEA addition)
♦	2275	firing or tampering with vessels
♦	2276	breaking and entering vessels
♦	2280	violence against maritime navigation (VCCLEA addition)
♦	2281(NOT(A))	violence against fixed platforms (VCCLEA addition)
♦	2332	penalties for homicide
♦	2332a	use of weapons of mass destruction (VCCLEA addition)
♦	2340A	torture
♦	2383	rebellion or insurrection
♦	2384	sedition conspiracy
♦	2385	advocating the overthrow of the government
♦	2389	recruiting for service against U.S.
♦	2390	enlistment to serve against U.S.
♦	2421	transportation for illegal sexual activity
♦	2422	coercion into interstate travel for illegal sexual activity
♦	2423	transportation of minors for illegal sexual activity

(2) Title 21 United States Code Sections

♦	841(e)	boobytraps on federal property
♦	848(e)	death penalty for criminal offenses
♦	858	endangering human life while manufacturing controlled substances

(3) Title 26 United States Code Sections

♦	5861(a) thru (l)	firearms

(4) Title 42 United States Code Sections

♦	2000(e)(13)	killing of officer while enforcing Equal Employment Act
♦	2283(a)	protection of nuclear inspectors
♦	2284(a)	sabotage of nuclear facilities
♦	3631	interference with housing

(5) Title 49 United States Code Sections

♦	46502	aircraft piracy
♦	46504	interference with flight crew members
♦	46505(c)	carrying a weapon on an aircraft
♦	46507	false information and threats

b. * Title 18, United States Code Section 2113(a). Title 18, United States Code Section 2113(a) provides in part:

> "Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . . shall be fined under this title or imprisoned not more than twenty years, or both."

This statute covers various offenses, including not only bank robbery but also embezzling bank funds, stealing bank property, and bank larceny.

With regard to the specific crime of bank robbery, the offense shall be considered a crime of violence, since the offense involves an explicit or implicit threat of force and thus has as an element the threatened use of physical force against the person or property of another. For offenses pursuant to § 2113(a) other than bank robbery, see Section 7.e. below.

c. Conspiracy, Attempt, and Similar Offenses Which Involve an Underlying Offense. The statutes listed in this section cover conspiracy offenses (see, e.g., 18 U.S.C. § 371) when an individual has planned with others to commit a particular crime. Other listed statutes cover attempted offenses, i.e. when an individual tried but did not succeed in committing the crime. In reviewing these types of offenses, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense is categorized as violent pursuant to Section 6.a. of this Program Statement, e.g., murder, then the attempt or the conspiracy offense is also

violent. The underlying offense will be included in the PSI and may be noted on the J&C.

Other statutes listed in this section do not criminalize behavior but set out penalties that result from violating other statutes.

> Example: 18 U.S.C. § 924(a)(1)(B) provides that whoever **"knowingly violates subsection (a)(4),(f),(k),(r),(v), or (w) of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both."**
>
> The J&C may indicate the sentence was imposed pursuant to the penalty provisions of § 924(a)(1)(B) without indicating the conviction for the underlying offense. The PSI, however, notes the underlying conviction, "Transporting a Destructive Device in Interstate Commerce" [18 U.S.C. § 922(a)(4)]. In order to determine whether the offender's current offense is violent, staff should assess whether the underlying offense is violent in accordance with Section 6.a. of this Program Statement; if the underlying offense is violent, then the offender should be deemed violent.

The following offenses **may** be violent depending on the underlying offense.

Title 18, United States Code Sections

♦ *241	conspiracy to deprive civil rights (if conspiracy)
♦ *371	conspiracy to commit offense/fraud against U.S.
♦ *372	conspiracy to impede or inure officer
♦ *924	penalties for firearms violations
♦ *1962	racketeering
♦ *2118(d)	robberies involving controlled substances

7. OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN BUREAU PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed in either this section or Section 6. If an

inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

Inmates whose current offense is a felony that:

- has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
- involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
- by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
- by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

a. Criminal Offenses with an Enhanced Base Offense Level. Convictions for an offense listed below may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether an offense listed below involved the use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Base Offense Level." This subsection references a particular U.S. Sentencing Guideline

provision that distinguishes between violations of the particular criminal code section that are committed with and without force.

Example: Title 18 United States Code Section 241, Conspiracy Against Rights provides:

> **"If two or more persons conspire to injure, oppress, threaten or intimidate any person . . . in the free exercise or enjoyment of any right or privilege. . . ."**

This crime may or may not be committed through the use of force or threatened use of force, since one can be oppressed through means other than force. Pursuant to U.S. Sentencing Guideline Section 2H2.1:

- if the crime involved obstructing an election or registration, and the obstruction occurred using force or threat of force against persons or property, the base offense level is 18, or
- if the obstruction occurred without the use or threatened use of force, such as forgery, fraud, theft, deceit, etc., the base offense level is 12.

If an offender was convicted of an offense listed below, case management staff must examine the base offense level to determine whether the offense would preclude the inmate from receiving certain Bureau program benefits. If the PSI does not include an explanation as to the reason for assigning a particular base offense level, case management staff may need to examine the particular Sentencing Guideline referenced.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a base level adjustment for the use or threatened use of force. Accordingly, it is possible that an examination of the Offense Computation section of the PSI may reveal no mention of the use or threatened use of force. When the PSI fails to explain the reason for assigning a particular base offense level, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Case management staff may contact institution legal staff or Regional Counsel if they have questions regarding this section. A list of offenses for which the Sentencing Guidelines base offense level is affected by the use or threatened use of force follows. At the Director's discretion, inmates with such an offense shall be precluded from receiving certain Bureau program benefits.

Title 18, United States Code Sections

♦	33	destruction of motor vehicles or facilities
♦	241	conspiracy against rights **(for other than conspiracy)**
♦	242	deprivation of rights under color of law
♦	592	putting troops at polls
♦	593	interference by armed forces
♦	1791	possessing contraband in prison
♦	1952	transporting items in aid of racketeering
♦	*2116	railway or steamboat post office
♦	2231(a)	assault on persons executing search warrant
♦	2381	treason

b. Criminal Offenses with a Specific Offense Characteristic Enhancement. Convictions for an offense listed below, like those listed in Section 7.a., may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

> Example: Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base

offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

In some cases, an inmate may be convicted of an offense listed in this section as well as 18 U.S.C. § 924(c)(1), use of a firearm during a crime of violence or drug trafficking crime. According to the U.S. Sentencing Guidelines, if a defendant receives a § 924(c)(1) conviction, the court may not assess a two-level ▒Specific Offense Characteristic▒ enhancement for possession of a firearm; however, in light of the Supreme Court ruling in *Bailey v. U.S.*, 116 S.Ct. 501 (1995), a number of § 924(c)(1) convictions have been vacated. In *Bailey*, the Court held that the term ▒use▒ connotes an active employment of the firearm. If any of the offenses listed in this section were accompanied by a § 924(c)(1) conviction that was subsequently vacated due to the *Bailey* decision, staff shall presume that the inmate would have received a two-level ▒Specific Offense Characteristic▒ enhancement for possession of a firearm unless there is a specific court order to the contrary. Thus, absent a court order specifically denying the application of a two point enhancement for possession of a firearm, the inmate will not receive certain Bureau program benefits.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a Specific Offense Characteristic for the use of force. Alternatively, the PSI may fail to adequately describe the Specific Offense Characteristic that underlies the increase in offense level. In either case, it is possible that an examination of the Offense Computation section of the PSI reveals no mention of the use of force. If this occurs, case management staff must examine the particular Sentencing Guideline referenced to determine whether

the court found that the use of force was implicated in the offense.

Example: The PSI in the above scenario may state "SOC (specific offense characteristic) 2F1.1(4) increase 2 levels." If the Report does not further state "since the offense involved the conscious or reckless risk of serious bodily injury, increase by two levels pursuant to 2F1.1(4)," the case management staff may have to examine Guideline 2F1.1(4) to determine that the only basis for this particular increase is a finding that the offense included the risk of bodily injury.

Case management staff may contact institution legal staff or Regional Counsel if they have questions regarding this section. Below is a list of offenses for which there could be a Specific Offense Characteristic enhancement for the use of force:

(1) Title 16, United States Code Sections

- 773e(a)(2), (3),(4),(6) violation of Northern Pacific Halibut Act
- 773g violation of Northern Pacific Halibut Act
- 1857(a)(D), (E),(F),(H) violation of National Fishery Management Program
- 1859 violation of National Fishery Management Program
- 2435(4),(5), (6),(7) violation of Antarctic Marine Living Resources Convention
- 2438 violation of Antarctic Marine Living Resources Convention
- 3606 violation of North Atlantic Salmon Fishing
- 3637(a)(2), (3),(4),(6), (c) violation of Pacific Salmon Fishing
- 5009(5),(6), (7),(8) violation of North Pacific Anadromous Stock Convention
- 5010(b) violation of North Pacific Anadromous Stock Convention

(2) Title 18, United States Code Sections

♦ 755	officer permitting escape
♦ 757	procures escape for prisoner of war
♦ 874	kickbacks from public works employees
♦ 894	extending credit through extortionate means
♦ 1163	embezzlement/theft from Indian organizations
♦ 1503	influencing or injuring officer or juror
♦ 1505	obstruction of proceedings before departments or agencies
♦ 1511	obstruction of state or local law enforcement
♦ 1516	obstruction of a federal audit
♦ 1517	obstructing financial examination
♦ 1951	interference with commerce by threats/violence
♦ 2112	robbery of personal property of United States
♦ *2116	breaking into a mail car

(3) Title 21, United States Code Sections

♦ 841(NOT(e)),	controlled substance violation
♦ *846	attempt and conspiracy

(4) Title 26, United States Code Sections

♦ 7212	attempt to interfere with revenue laws
♦ 7214	unlawful acts by employees of the IRS

(5) Title 30, United States Code Sections

♦ 1461(a)(3), (4),(5),(7)	resisting officers for violations under Deep Seabed Mineral Resources Act
♦ 1463	violations of Deep Seabed Mineral Resources Act

(6) Title 33, United States Code Section

♦ 1232(b)(2)	ports and waterways safety enforcement provisions

(7) Title 40, United States Code Section

♦ 193f(a)	security of Capitol grounds and buildings

(8) Title 42, United States Code Sections

♦ 1973aa	application of prohibition to other States
♦ 1973aa-1	residence requirements for voting
♦ 1973aa-1a	bilingual election requirements
♦ 1973aa-3	penalty
♦ 1973bb	enforcement of twenty-sixth amendment
♦ 1973gg-10	criminal penalties
♦ 2283(b)	protection of nuclear inspectors
♦ 19151(2), (3),(4),(5)	violation of Ocean Thermal Energy Conversion Act
♦ 9152(d)	violation of Ocean Thermal Energy Conversion Act

(9) Title 46, United States Code Section

♦ 1903	Manufacture, Distribution, or possession with intent to manufacture controlled substances

(10) Title 49, United States Code Section

♦ 46505(b)	carrying a weapon on an aircraft

c. Criminal Offenses That May Preclude an Inmate's Receiving Certain Bureau Program Benefits. In addition to Sections 7.a. and 7.b. above, an inmate may be precluded from receiving certain Bureau program benefits based on an offense listed in this section. For the offenses listed below, the Sentencing Guidelines may provide little insight into the court's findings. Accordingly, rather than simply examining the base offense level or the specific offense characteristics, case managers must carefully examine the entire Offense Computation section of the PSI and, if necessary, the Offense Conduct section to determine if the offense would preclude an inmate's receiving certain Bureau program benefits based on whether the offense satisfies the standard listed in the introductory portion of Section 7.

The following offenses may preclude an inmate's receiving certain Bureau program benefits based on a variety of factors.

(1) Title 7, United States Code Section

- 473c-1 offenses in relation to sampling of cotton

(2) Title 16, United States Code Sections

- 5106(e)(5), (6),(7),(9), (f)(2) violation of Atlantic Coast Fisheries Cooperative Management

(3) Title 18, United States Code Sections

- 700 desecration of the flag of the United States
- 751 escape from federal prison
- 752 instigating/assisting escape from federal prison
- 831 prohibited acts involving nuclear materials
- 876 mailing threatening communications
- 877 mailing threatening communications from foreign country
- 1153 offenses within Indian Country
- 1512(b) tampering with a witness/victim/informant
- 1708 theft or receipt of stolen mail
- 1792 mutiny and riot in prison
- 1956 money laundering
- 2117 breaking into carrier facilities
- 2152 destruction of submarine and torpedo works
- 2153 destruction of war materials
- 2154 production of defective war material
- 2155 destruction of national defense materials
- 2156 production of defective national defense material
- 2192 incitation of seamen to revolt
- 2193 mutiny
- 2247 repeat offenders
- 2387 activities involving armed forces

(4) Title 40, United States Code Sections

- 193f(a),(b) security of Capitol grounds and buildings

d. Conspiracy, Attempt, and Other Offenses Which Involve an Underlying Offense. Some of the statutes listed in this section cover conspiracy offenses (see, e.g., 21 U.S.C. § 846) when an individual has planned with others to commit a particular crime. Other listed statutes cover attempted offenses (see, e.g., 21 U.S.C. §§ 846 and 963) when an individual tried but did not succeed in committing the crime. In reviewing these types of offenses, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense would preclude the inmate from receiving certain Bureau program benefits based on any of the other portions of Section 7 of this policy, the conspiracy or the attempt offense shall also preclude the inmate from receiving the same benefits. The underlying offense will be included in the PSI and may be noted on the J&C.

Example: The Judgment and Commitment Order may indicate a conviction for "Attempt and Conspiracy" (21 U.S.C. § 846). The accompanying Presentence Investigation Report will reference the underlying crime, in many cases it will be "Possession with Intent to Distribute a Controlled Substance" (21 U.S.C. § 841). Staff should then review the underlying offense (in this case possession of controlled substance) to determine whether it satisfies the standard listed in the introductory portion of Section 7. As noted in the example in section b above, if the PSI indicates that the defendant received a 2 level increase for possessing a dangerous weapon, then the offense should preclude the inmate from receiving certain Bureau program benefits; if no such enhancement was given, the offense should not preclude the inmate from receiving such benefits.

(1) Title 18, United States Code Sections

- *241 conspiracy to deprive civil rights (if conspiracy)
- *371 conspiracy to commit offense/fraud against U.S.
- *372 conspiracy to impede or inure officer
- *924 penalties for firearms violations

♦ *1962	racketeering
♦ *2118(d)	robberies involving controlled substances

(2) Title 21, United States Code Sections

♦ *846	attempt and conspiracy
♦ 848	controlled substances violations as criminal enterprise
♦ 963	conspiracy or attempt to violate controlled substance laws

e. Special Circumstances

♦ Title 18, United States Code § 922(g). All offenses under 18 U.S.C. § 922(g) shall preclude an inmate from receiving certain Bureau program benefits.

♦ *Title 18, United States Code § 2113(a). Excluding bank robbery (see Section 6.b. above), other offenses covered by 18 U.S.C. § 2113(a), (e.g., bank larceny, etc.), shall be reviewed similarly to offenses in Section 7.b. Defendants may receive a Specific Offense Characteristic enhancement that will result in an increase in the base offense level. Such enhancements provide for an increase in the defendant's base offense level if:

- a firearm was discharged,
- a firearm or other dangerous weapon was brandished, displayed, possessed or used, or
- an express or implied threat of death was made (U.S.S.G. 2B3.2(b), Application Notes 2 and 6).

If a defendant received such an enhancement (or one of the other enhancements involving the use or threatened use of force), the offense shall preclude the inmate's receiving certain Bureau program benefits.

♦ Title 18, United States Code § 2243. A conviction for sexual abuse of a minor or ward shall preclude an inmate from receiving certain Bureau program benefits.

8. OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987. The Sentencing Guidelines are generally not applicable for offenses committed before November 1, 1987. Accordingly, for offenses identified in Section 7 or offenses similar to those listed in Section 7 of this Program Statement that were committed before this date, case managers must make a determination, based on the narrative description of the crime contained in the PSI, whether the offense involved:

- the use, attempted use, or threatened use of force;
- the use, carrying, or possession of a dangerous weapon;
- a serious potential risk that force might be used against the person or property of another; or
- sexual abuse committed upon children.

Offenses listed in Section 6, Crimes of Violence, or offenses similar to those listed in Section 6, which were committed before November 1, 1987, shall be treated in the same manner as ※new law※ offenses.

9. CRIMES CODIFIED PURSUANT TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994. The VCCLEA created a number of new Federal criminal offenses and enhanced penalties for several existing offenses. Some of the new offenses are included in the above lists, but the lists will be revised as needed after the U.S. Sentencing Commission drafts new guidelines. These lists will also be updated periodically to reflect statutory changes or at the Director's discretion.

/s/
Kathleen M. Hawk
Director

APPENDIX 11

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103d CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPORT 103-320

RESIDENTIAL SUBSTANCE ABUSE TREATMENT IN FEDERAL PRISONS

NOVEMBER 3, 1993.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 3350]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3350) to establish a program of residential substance abuse treatment within Federal prisons, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SUBSTANCE ABUSE TREATMENT IN FEDERAL PRISONS.

Section 3621 of title 18, United States Code, is amended—

(1) in the last sentence of subsection (b), by striking ", to the extent practicable,"; and

(2) by adding at the end the following new subsection:

"(e) SUBSTANCE ABUSE TREATMENT.—

"(1) PHASE-IN.—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall provide substance abuse treatment—

"(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

"(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

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"(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

"(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—

"(A) GENERALLY.—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provide under paragraph (1) of this subsection, shall remain in the custody of the Bureau for such time (as limited by subparagraph (B) of this paragraph) and under such conditions, as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has resurred.

"(B) PERIOD OF CUSTODY.—The period the prisoner remains in custody after successfully completing a treatment program shall not exceed the prison term the law would otherwise require such prisoner to serve, but may not be less than such term minus one year.

"(3) REPORT.—The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1996, and on January 1 of each year thereafter, a report. Such report shall contain—

"(A) a detailed quantitative and qualitative description of each substance abuse treatmant program, residential or not, operated by the Bureau;

"(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible, and

"(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

"(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this subsection.

"(5) DEFINITIONS.—As used in this subsection—

"(A) the term 'residential substance abuse treatment' means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set forth from the general prison population—

"(i) directed at the substance abuse problems of the prisoner; and

"(ii) intended to develop the prisoner's cognitive, behaverial, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems; and

"(B) the term 'eligible prisoner' means a prisoner who is—

"(i) determined by the Bureau of Prisons to have a substance abuse problem; and

"(ii) willing to participate in a residential substance abuse treatment program.".

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 3350 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

Substance abuse treatment for prison inmates is a powerful tool for reducing recidivism, easing prison overcrowding, and ultimately preventing crime. H.R. 3350 will ensure that by 1997 every Federal prisoner who has a substance abuse problem and who is willing to undergo treatment will be placed in a long-term residential treatment program.

BACKGROUND

The link between substance abuse and crime is well-established. Drug addiction can increase an offender's rate of predatory criminal activity by 600 percent.[1] Much of the rapid and financially draining increase in prison populations over the past several years is attributable to substance abuse.[2] Substance abuse also is a major cause of the tremendous growth in the Federal prison population over the past decade, and far too few Federal inmates are receiving treatment for substance abuse.[3] Offenders with substance abuse problems also have an extraordinarily high rate of recidivism.[4] It is the Committee's belief that releasing an inmate into the community without treating his or her substance abuse problem while the inmate is in custody is to virtually guarantee future crime.

With appropriate treatment, the recidivism rate of substance abusers can be dramatically reduced. A study of one residential treatment center, the Stay'N Out program at New York's Arthur Kill Correctional Facility, found that 78 percent of its graduates were still out of prison three years after release, while about half of comparable substance-abusing inmates who do not receive treatment will be back in prison within the same period.[5] In Wisconsin, a follow-up study of prison substance abuse treatment graduates who had been out of prison for between one and seven years found that 76 percent of these individuals had remained out of prison.[6] Virginia's Southampton Intensive Treatment Center has achieved an 84 percent success rate—the 15 percent recidivist rate among its graduates is well below that for untreated prisoners.[7]

It is the Committee's judgment that substance abuse treatment in prison not only has valuable crime-prevention benefits, but is among the most useful responses to substance abuse problems more generally. Incarceration may offer the best opportunity for society to reach substance-abusing individuals who are committing other crimes. The Committee is informed that outpatient treatment programs have produced mixed results, and that it is extremely difficult for the substance abuser to reform himself or herself when he or she returns each evening to the community in which the problem developed.

Despite the benefits, and despite studies showing that nearly 50 percent of Federal inmates have substance abuse problems, the Federal government is now treating only a small fraction of eligible inmates. Since the Bureau of Prisons began its current substance abuse treatment program in 1990, it has treated only 6,000 of the more than 100,000 inmates who have been incarcerated in Federal institutions during that period. There is an immense gap between

[1] See Johnson, Lipton & Wish, "Facts About the Criminality of Heroin and Cocaine Abusers and Some New Alternatives to Incarceration," (New York: 1986); "Chaiken, Crime Rates and Substance Abuse Among Types of Offenders" in Johnson & Wish, eds., "Crime Rates Among Drug Abusing Offenders: Final Report to the National Institute of Justice" (1986).

[2] See "Federal Prison Substance Abuse Treatment Availability Act of 1991." Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 102d Cong., 1st Sess. (June 6, 1991) (testimony of Michael Quinlan, Director, Federal Bureau of Prisons).

[3] Id.

[4] Id. (testimony of Robert Anderson; testimony of Douglas Lipton).

[5] See Wexler, Falkin & Lipton, "A Model Prison Rehabilitation Program—An Evaluation of the 'Stay'N Out' Therapeutic Community: Final Report to the National Institute on Drug Abuse" (1988).

[6] See "The Wisconsin Drug Abuse Treatment Unit," monograph published by the Bureau of Justice Assistance (August 1990).

[7] See "An Evaluation: Southampton Intensive Treatment Center—A Report to the Virginia State Crime Commission, Virginia Department of Corrections (1992).

what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons.

The Clinton Administration, both in the testimony of its representatives before the Subcommittees on Crime and Criminal Justice and in its 1993 Interim Drug Control Strategy, has indicated its intention to make greater use of the opportunities to provide substance abuse treatment in prison.[9] H.R. 3350 will further that policy objective.

BRIEF EXPLANATION OF H.R. 3350

H.R. 3350 is intended to expand the Bureau of Prisons' substance abuse treatment program so that every eligible inmate can receive substance abuse treatment. It requires the Bureau of Prisons to provide treatment for at least 50 percent of eligible prisoners by the end of fiscal year 1995, for at least 75 percent of eligible prisoners by the end of fiscal year 1996, and for all eligible prisoners by the end of fiscal year 1997.

As short-term treatment programs often have little or no lasting effect on the abuser,[9] the treatment must be long-term—lasting from six to twelve months. It also must be residential, with the prisoners in treatment housed apart from the general prison population for the entire duration of the treatment program.

H.R. 3350 also provides that the Bureau of Prisons may reduce, by up to one year, the sentence of an inmate who successfully completes the treatment program. The Committee believes such an incentive is necessary to draw into treatment many inmates who may otherwise not be willing to undergo a difficult and painful treatment program. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort, and commitment from the participants. The experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life opportunities, and will undertake to complete the program.[10]

102D CONGRESS

In the 102d Congress, on June 5, 1991, the Subcommittee on Crime and Criminal Justice held a hearing on H.R. 548 (which was substantially similar to H.R. 3350).[11] The text of H.R. 548 subsequently was incorporated into a comprehensive anti-crime bill reported by the Subcommittee on August 26, 1991. That bill was merged with other legislation to form H.R. 3371, which was reported by the Judiciary Committee on September 26, 1991. The House of Representatives passed H.R. 3371 on October 22, 1991.

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[9] See statement of Deputy Attorney General Philip B. Heymann before the Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, U.S. House of Representatives, concerning The Violence Crime Control and Law Enforcement Act of 1993 at 6-9 (October 21, 1993).

[9] See "Federal Prison Substance Abuse Treatment Availability Act of 1991," Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 102d Cong., 1st Sess., pagein (June 5, 1991).

[10] Id. (testimony of John David, Jose Luis Diaz and Vanessa Hodges, graduates of New York's Stay'N Out program).

[11] "Federal Prison Substance Abuse Treatment Availability Act of 1991," Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 102d Cong., 1st Sess. (June 5, 1991).

After a House-Senate conference on H.R. 3371, the conferees reported a bill which included the substance of H.R. 548. The bill reported by the conference passed the House on November 27, 1991, but failed to become law because the Senate never voted on it.

103D CONGRESS

In the 103d Congress, an initiative for providing substance abuse treatment in Federal prison was again included in a comprehensive anti-crime bill, H.R. 3131. On October 21, 1993, the Subcommittee on Crime and Criminal Justice held a hearing on selected aspects of H.R. 3131, including the sections on substance abuse treatment in prison. On October 26, 1993, the substance abuse treatment in Federal prisons proposal in H.R. 3131 was introduced as a separate bill, H.R. 3350.

COMMITTEE ACTION

On October 28, 1993, the Committee on the Judiciary met to consider H.R. 3350. The Committee adopted two amendments to H.R. 3350. The first amendment would have changed the treatment duration requirement to be "up to twelve months," with no minimum length of treatment. By unanimous consent, the amendment was modified to set a six-month minimum on treatment duration, and as modified it was adopted by voice vote.

The second amendment directed the Bureau of Prisons to give priority of treatment based on an eligible prisoner's proximity to release date. This amendment was adopted by voice vote.

A reporting quorum being present, the Committee ordered H.R. 3350, as amended, favorably reported to the full House by a roll call vote of 34 to 1.

SECTION-BY-SECTION ANALYSIS

SECTION 1

H.R. 3350 has one section, which amends Section 3621 of title 18 by adding a new subsection (e).

Paragraph (1)

Paragraph (1) of this new subsection directs the Bureau of Prisons to provide residential substance abuse treatment to at least 50% of willing inmates with substance abuse problems by the end of fiscal year 1995; to at least 75% of willing inmates with substance abuse problems by the end of fiscal year 1996; and to all willing inmates with substance abuse problems by the end of fiscal year 1997. Although the term "substance abuse" is not defined, the Committee intends it to include all substance abuse that has a bearing on criminal behavior, including alcohol abuse, abuse of legal drugs, and abuse of illicit drugs and controlled substances.

A concern was raised by the Department of Justice that the requirement in H.R. 3350 for treatment for "all" prisoners by the end of FY 1997 might be interpreted to mean that every eligible prisoner must either have received treatment or be receiving treatment in that year, even if the prisoner has several years remaining on his or her sentence. That was not the intent of the Committee, and

an amendment to H.R. 3350 during Committee mark-up has made the intent of the Committee clear.

As reported by the Committee, H.R. 3350 explicitly directs the Bureau of Prisons to give priority in making treatment available to prisoners based on proximity to their release dates. Thus, every eligible prisoner in a Federal facility at the end of FY 1997, and every eligible prisoner entering thereafter, will have the opportunity to receive treatment at some point during their incarceration on a priority basis. Under the reported bill, the Bureau of Prisons must make a determination of proximity of release date, and may provide treatment at an appropriate point in the inmate's term of imprisonment based on that determination. The bill does not require that an inmate receive treatment in the first year of a 20-year sentence, if the Bureau of Prisons determines that treatment would be more appropriate at a later point. Neither does it preclude a determination by the Bureau of Prisons that such treatment would be appropriate in an inmate's first year of incarceration.

Paragraph (2)

Paragraph (2)(a) of this new subsection provides that an inmate who, in the judgment of the Bureau of Prisons, has successfully completed its residential substance abuse treatment program shall remain in the custody of the Bureau of Prisons for such time and under such conditions as the Bureau of Prisons deems appropriate. If those conditions are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau of Prisons must periodically test the inmate for substance abuse and discontinue such conditions on determining that such abuse has recurred.

Paragraph (2)(b) of this new subsection provides that the prisoner's total period of custody shall not be longer than the period of custody the inmate would otherwise have been required to serve, but may not be less than such term minus one year. In effect, this subparagraph authorizes the Bureau of Prisons to shorten by up to one year the prison term of a prisoner who has successfully completed a treatment program, based on criteria to be established and uniformly applied by the Bureau of Prisons.

Paragraph (3)

Paragraph (3) of the new subsection requires the Bureau of Prisons to submit a detailed report to the Committees on the Judiciary of the Senate and the House of Representatives on January 1 of each year on the nature, extent, and success of its substance abuse treatment programs.

Paragraph (4)

Paragraph (4) of the new subsection authorizes in each fiscal year the appropriation of such funds as are necessary to carry out this new subsection.

Paragraph (5)

Paragraph (5)(A) of the new subsection defines "residential substance abuse treatment" as a course of individual and group activities, lasting between 6 and 12 months, in residential treatment fa-

cilities set apart from the general prison population. The course of treatment must be directed at the substance abuse problems of the prisoner, and must be intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems.

Paragraph 5(B) defines "eligible prisoner" as a prisoner who is determined by the Bureau of Prisons to have a substance abuse problem and who is willing to participate in a residential substance abuse treatment program.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 3350, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 1, 1999.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3350, a bill to establish a program of residential substance abuse treatment within federal prisons.

Enactment of H.R. 3350 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, Director).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 3350.
2. Bill title: A bill to establish a program of residential substance abuse treatment within federal prisons.
3. Bill status: As ordered reported by the House Committee on the Judiciary on October 28, 1999.
4. Bill purpose: H.R. 3350 would require the Bureau of Prisons to provide all federal prisoners with substance abuse problems the opportunity to participate in a substance abuse treatment program that lasts between 6 and 12 months. This bill would establish a phased implementation schedule for meeting this requirement. H.R. 3350 also would allow prisoners who successfully complete a substance abuse treatment program to be released up to one year early.
5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1996	1996	1998	1997	1998
Estimated authorization of appropriations	0	20	33	48	48
Estimated outlays	0	17	39	46	48

The costs of this bill fall within budget function 750.

Basis of estimate: Under current law, the Bureau of Prisons provides substance abuse treatment to the extent possible given available funds. Currently, approximately 3,000 prisoners in 31 federal prisons are participating in 9-month substance abuse treatment programs, at a cost of about $2,500 per participating prisoner. This cost includes in-prison expenses as well as costs to support community transition services for the prisoners upon release from prison. Consistent with the implementation schedule required by this bill and assuming that most eligible prisoners would participate, CBO estimates that an additional 8,000 prisoners in fiscal year 1995, 13,000 prisoners in fiscal year 1996, and 18,000 prisoners in fiscal year 1997 and thereafter would participate in treatment programs. We estimate that these programs would cost the Bureau of Prisons an additional $20 million in fiscal year 1995 and $33 million in fiscal year 1996, as they are phased in. Costs would rise to $48 million in fiscal year 1997 and similar amounts in subsequent years.

Because this bill would allow prisoners who successfully complete a substance abuse treatment program to be released up to one year early, there could be some savings (up to $20,000 per prisoner) to the extent that prisoners covered by this provision serve shorter prison terms. However, CBO has no basis for estimating the amount of such savings.

6. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. CBO estimates that enactment of H.R. 3350 would not affect direct spending on receipts. Therefore, pay-as-you-go procedures would not apply to the bill.
7. Estimated cost to State and local governments: None.
8. Estimated comparison: None.
9. Previous CBO estimate: None.
10. Estimate prepared by: Susanne Mehlman.

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11. Estimate approved by: C.G. Nuckols, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3350 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 3621 OF TITLE 18, UNITED STATES CODE

§ 3621. Imprisonment of a convicted person

(a) * * *
(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—
(1) * * *

* * * * * * *

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall[, to the extent practicable,] make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

* * * * * * *

(c) SUBSTANCE ABUSE TREATMENT.—
(1) PHASE-IN.—In order to carry out the requirement of the last sentance of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall provide substance abuse treatment—
(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;
(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—

(A) GENERALLY.—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provide under paragraph (1) of this subsection, shall remain in the custody of the Bureau for such time (as limited by subparagraph (B) of this paragraph) and under such conditions, as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) PERIOD OF CUSTODY.—The period the prisoner remains in custody after successfully completing a treatment program shall not exceed the prison term the law would otherwise require such prisoner to serve, but may not be less than such term minus one year.

(3) REPORT.—The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain—

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible, and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this subsection.

(5) DEFINITIONS.—As used in this subsection—

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting

between 6 and 12 months, in residential treatment facilities set forth from the general prison population—

(i) directed at the substance abuse problems of the prisoner; and

(ii) intended to develop the prisoner's cognitive, behavorial, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems; and

(B) the term "eligible prisoner" means a prisoner who is—

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program.

ADDITIONAL VIEWS OF HON. BILL McCOLLUM, HON. HAMILTON FISH, HON. CARLOS J. MOORHEAD, HON. HENRY J. HYDE, HON. GEORGE W. GEKAS, HON. HOWARD COBLE, HON. LAMAR S. SMITH, HON. STEVEN SCHIFF, HON. JIM RAMSTAD, HON. CHARLES T. CANADY, AND HON. BOB GOODLATTE

We do not oppose H.R. 3350, a bill to establish a program of residential substance abuse treatment within Federal prisons. This bill is one of the series of small crime bills marked up in Judiciary Committee on October 28, 1993. However, this bill and the others considered on October 28, 1993 do not constitute major crime legislation and do not address the critical issue central to controlling the wave of violent crime rolling over our nation: stopping the revolving door that spins out those arrested for violent crimes faster and faster every day. Consequently, we do not believe this bill should be brought to the Floor until comprehensive legislation which does address this and other issues critical to reforming our criminal justice system is brought forward.

In addition to H.R. 3350, other bills considered by the Judiciary Committee on October 28, 1993 included grant programs designed to provide for community policing, drug treatment for State prison inmates, and more effective programs to reduce juvenile gang participation and drug trafficking. These narrow proposals do not deal with the major problems facing our criminal justice system, issues that could have been addressed if we were considering the omnibus bill, H.R. 3131, as originally scheduled, or the omnibus bill introduced by Congressman McCollum, H.R. 2872, and cosponsored by 80 Members.

Consideration of these bills may be politically expedient and may make for good political rhetoric, but it does not address the most serious problems facing the criminal justice system, including the inability to keep repeat, violent offenders off the streets. The statistics are alarming: one murder every 22 minutes, one forcible rape every 5 minutes, one violent crime every 22 seconds, one aggravated assault every 28 seconds. Every year nearly 5 million people in the United States are victims of violent crime. Most importantly, 7 percent of the criminals account for 80 percent of the violent crime. We must put a stop to this wave of violent crime by career criminals which is gripping our nation by passing comprehensive legislation that will reform the entire system from top to bottom. What is needed are laws that will take violent criminals off the streets, and keep them locked up, and laws that will restore swiftness and certainty of punishment to our criminal justice system.

Putting more police on the streets is a necessary, but not sufficient, component in addressing violent crime. The only way to get the repeat, violent offenders off the street for good is to increase police presence and build more prisons to hold these career crimi-

nals. The amount of violent crime has increased 531 percent since 1960, yet violent criminals are serving shorter sentences. The average time served by violent offenders is only 37 percent of the sentence given. Without a place to put those arrested, the State prison revolving door will simply spin faster. That is why H.R. 2872 proposes a cost sharing agreement with the States to build a national system of regional prisons to house State violent criminals. To qualify for this partnership States must require violent criminals to serve at least 85 percent of their sentences and enact mandatory minimum sentences for certain violent offenders. Unless comprehensive legislation is considered, this critical issue of prison overcrowding will not be addressed and deterrence and incapacitation of the truly dangerous will not be restored to the criminal justice system.

Additional provisions that are needed for comprehensive reform of the criminal justice system, which were not addressed by the bills reported from the Judiciary Committee, include the following: restrictions on the use of habeas corpus petitions to delay the carrying out of death sentences, the establishment of additional mandatory minimum sentences for major drug and firearm crimes, restoration of the Federal death penalty, establishment of a drug kingpin death penalty for those who traffic in very large quantities of narcotics, adoption of the good faith exception to the exclusionary rule, and establishment of tough new laws on terrorism and new protections for women and children.

These are all issues which the Members of the Judiciary Committee deserve to have an opportunity to debate and resolve. More importantly, the American people expect their elected representatives to act in a responsible and responsive manner to solve the serious and tragic problem of crime in our society.

The reality is that the Judiciary Committee's action on October 28, 1993 is likely to be the only substantive action on crime legislation by the Committee this year. To date the Committee has abdicated its legislative responsibility to construct strong anticrime legislation. It is also clear that these events could mean that the full House of Representatives will not be allowed to exercise its proper role in formulating this legislation either. Instead, the House might essentially go to a Conference Committee with a "carcass of a Crime bill." The Senate and a few House Members would be able to determine the contents of this Congress' crime bill.

In conclusion, this grant program may be helpful around the edges of the crime problem, but it does not provide the comprehensive response to violent crime that the American public demands. This bill should not have been brought to the House Floor under suspension of the rules until comprehensive legislation, which addresses the real crime emergency, had been considered by the Judiciary Committee.

BILL MCCOLLUM.
GEORGE W. GEKAS.
LAMAR SMITH.
HAMILTON FISH, JR.
HOWARD COBLE.
CARLOS J. MOORHEAD.
JIM RAMSTAD.
HENRY J. HYDE.
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STEVEN SCHIFF.
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No. 99-7504

Supreme Court, U.S.
FILED
MAR 24 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER A. LOPEZ, PETITIONER

v.

RANDY J. DAVIS, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Bureau of Prisons may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-5) is reported at 186 F.3d 1092.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1999. A petition for rehearing was denied on September 16, 1999. Pet. App. 3, at 1. The petition for a writ of certiorari was filed on December 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 3621(e)(2)(B) of Title 18 provides that the Bureau of Prisons (BOP) may reduce by up to one year the prison term of a prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program. Petitioner was denied eligibility for such early release under a BOP regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), because his current offense is a felony that involved the carrying, possession, or use of a firearm. The United States District Court for the District of South Dakota granted his petition for a writ of habeas corpus and ordered BOP to reconsider petitioner for early release without reliance on that regulation. Pet. App. 2, at 1-8. The court of appeals reversed and upheld BOP's policy as a valid exercise of its discretion. Pet. App. 1, at 1-5.

1. a. In 1994, Congress created an incentive for federal prisoners to participate in BOP's substance abuse treatment program.[1] Congress authorized BOP to reduce a prisoner's sentence up to one year based on successful completion of such a

[1] BOP's entire residential substance abuse treatment program consists of three components: (1) a 500-hour unit-based residential phase within the correctional institution; (2) a transitional phase also within the institution; and (3) a community-based transitional services phase, in a community corrections center or on home confinement. See Program Statement 5330.10, CN-01, ch. 5 at 1 (May 17, 1996).

program. 18 U.S.C. 3621(e)(2). The statute provides, in relevant part:

> **(2) Incentive for prisoners' successful completion of treatment program.--**
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> * * * * *
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> **(B) Period of custody.** -- The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. 3621(e)(2)(B).

b. BOP issued a regulation interpreting Section 3621(e)(2)(B) to exclude from eligibility "inmates whose current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3)." 26 C.F.R. 550.58 (1995). Included in Section 924(c)(3)'s definition of "crime of violence" is an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). BOP Program Statement 5162.02 provided that a drug trafficking conviction under 21 U.S.C. 841 or 846 would be considered a "crime of violence" for purposes of early release if the inmate received a two-level enhancement for possession of a dangerous weapon during the commission of the offense, under Sentencing

Guidelines §§ 2D1.1, 2D1.11. Program Statement 5162.02, CN-01, § 9 at 7 (July 24, 1995, as amended April 23, 1996).

The courts of appeals reached differing conclusions on the validity of that BOP regulation and program statement. See Pelissero v. Thompson, 170 F.3d 442, 445-448 (4th Cir. 1999) (BOP has discretion to define "nonviolent offense" to exclude crimes where relevant conduct included possession of a firearm, even if that definition does not harmonize with the judicial interpretation of "crime of violence" under Section 924(c)(3)); Venegas v. Henman, 126 F.3d 760, 761-763 (5th Cir. 1997) (same), cert. denied, 523 U.S. 1108 (1998); contra: Byrd v. Hasty, 142 F.3d 1395, 1396-1398 (11th Cir. 1998) (BOP's interpretation was inconsistent with the term "nonviolent offense" as used in Section 3621(e)(2)(B) because that term included, by implication, only offenses of conviction that were not "crimes of violence" within the meaning of Section 924(c)(3) and Section 3621(e)(2)(B) "addresses the act of convicting, not sentencing or sentence-enhancement factors"); Roussos v. Menifee, 122 F.3d 159, 161-164 (3d Cir. 1997) (BOP exceeded its authority); Bush v. Pitzer, 133 F.3d 455, 456-457 (7th Cir. 1997) (same); Martin v. Gerlinski, 133 F.3d 1076, 1079-1081 (8th Cir. 1998) (same); Downey v. Crabtree, 100 F.3d 662, 670 (9th Cir. 1996) (same); Fristoe v. Thompson, 144 F.3d 627, 631 (10th Cir. 1998) (same).

c. Effective October 15, 1997, BOP revised its regulation governing the Section 3621(e)(2)(B) early release program to clarify its criteria for such release. 62 Fed. Reg. 53,690. The accompanying commentary noted the conflicting judicial holdings on the prior regulation and explained that the new rule "avoids this complication by using the discretion allotted to the Director of [BOP] in granting a sentence reduction to exclude inmates whose current offense is a felony * * * that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosive." Ibid. As an exercise of the discretion vested in the Director of BOP, the amended regulation provides that certain categories of inmates "are not eligible for early release," including inmates whose current offense is a felony that involved the carrying, possession, or use of a firearm or dangerous weapon or explosive. 28 C.F.R. 550.58(a)(1)(vi)(B).

BOP Program Statement 5162.04 identifies offenses that, at the discretion of the BOP Director, preclude an inmate from receiving various BOP program benefits, including early release under Section 3621(e). Section 7 of the program statement provides that

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

> Inmates whose current offense is a felony that:
>
> * * * * *
>
> involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives * * *.

Program Statement 5162.04, § 7 at 9 (Oct. 9, 1997). Subsection 7(b) further specifies that controlled substances offenses, in violation of 21 U.S.C. 841(a) and 846, preclude an inmate from being considered for early release if he received a two-level enhancement under Sentencing Guidelines § 2D1.1 for possession of a firearm. Id., § 7(b) at 11-12.

2. On February 21, 1997, petitioner was convicted in the United States District Court for the Southern District of Iowa of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 72 months' imprisonment. That sentence was based in part on a two-level enhancement of the offense level under Sentencing Guidelines § 2D1.1(b)(1) because petitioner possessed a firearm in connection with his offense. Presentence Report 4, ¶7; 6, ¶17; Pet. App. 2, at 1.

We have been informed by BOP that, while serving his term of imprisonment, petitioner obtained a place on a waiting list to participate in a BOP substance abuse treatment program. On December 17, 1998, he was notified that he would not qualify under BOP's regulation for early release consideration after completion of the program because his current offense was a

felony that involved the possession or use of a firearm. Petitioner's anticipated release date is June 2, 2002. Pet. 3.

3. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, in the United States District Court for the District of South Dakota, challenging the denial of his early release eligibility. Pet. App. 2, at 1.

On January 6, 1999, the district court granted the writ. Pet. App. 2, at 1-8. The court held that BOP's categorical denial of early release to "all cases within one general group without individual consideration" was not an exercise of discretion. Id. at 8. The court held, "consistent with" earlier rulings invalidating BOP's original regulation and program statement (see pages 3-4, supra), that BOP exceeded its statutory authority by interpreting Section 3621(e)(2)(B) to allow it to continue "to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release." Id. at 7. The court thereby ordered BOP to reconsider petitioner for early release under Section 3621(e)(2)(B) in accordance with its opinion. Id. at 8.

4. The court of appeals reversed. Pet. App. 1, at 1-5.[2] The court emphasized that Section 3621(e)(2)(6) "vests broad discretion in the BOP to determine which individuals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release." Id. at 3. The statute, it observed, "stat[es] only that the prison term of an inmate convicted of a nonviolent offense 'may be reduced by the Bureau of Prisons.'" Id. at 3. Thus, the court explained, a prisoner convicted of a nonviolent offense has no entitlement to early release. The court also concluded that Section 3621(e)(2)(6) does not "mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses." Ibid. And it noted that, where an agency fills a statutory gap, its permissible construction of the statute is entitled to deference. Id. at 4 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845, 866 (1984)). The court concluded that BOP relied on a "manifestly permissible construction of the statute" and appropriately exercised its discretion when it identified, as ineligible for early release, categories of prisoners convicted

[2]The court consolidated cases brought by ten federal prisoners that involved the same early-release issue. Pet. App. 1, at 1-2.

of nonviolent offenses within the meaning of the statute, but whose "underlying conduct indicates that they pose a serious risk to public safety." Ibid.

The court rejected the contention that its ruling was inconsistent with its earlier decision in Martin v. Gerlinski, 133 F.3d at 1079-1081, which invalidated BOP's original regulation and program statement (see pages 3-4, supra). Martin held that, because the statutory language limited eligibility to nonviolent offenders, BOP had to "look to the offense of conviction, not sentencing factors, in determining whether an offender was convicted of a 'nonviolent offense' and thus eligible under the statute for the early-release incentive." Pet. App. 1, at 4. The court explained that Martin is of no relevance to BOP's current policy because, in Martin, the court had not addressed whether "BOP may, as an exercise of discretion, see 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release," which the court now held it can. Ibid.

DISCUSSION

The court of appeals correctly held that the Bureau of Prisons (BOP) may exercise its discretion under 18 U.S.C. 3621(e)(2)(B), to deny early release to the category of prisoners

whose current offense is a felony that "involved the carrying, possession or use of a firearm," 28 C.F.R. 550.58(a)(1)(vi)(B). Because the circuits are divided on that issue, however, and because the question is important to the proper administration of the early release program by the Bureau of Prisons, the petition for a writ of certiorari should be granted.[3]

1. The Eighth Circuit correctly held that BOP may exercise its discretion under 18 U.S.C. 3621(e)(2)(B), to deny early release to the category of prisoners whose current offense is a felony that "involved the carrying, possession or use of a firearm," 28 C.F.R. 550.58(a)(1)(vi)(B). Section 3621(e)(2)(B) provides BOP with discretion to grant early release to nonviolent offenders who successfully complete a substance abuse treatment program. It states that the term of imprisonment of a prisoner convicted of a nonviolent offense "may be reduced" by BOP upon the prisoner's successful completion of a BOP substance abuse treatment program. 18 U.S.C. 3621(e)(2)(B) (emphasis added).

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[3] A petition for a writ of certiorari in another case raising the same issue and seeking review of the same judgment was docketed by this Court after the instant case was docketed. See Walker v. Davis, No. 99-7558. We are contemporaneously filing a brief in Walker suggesting the Court hold the petition in Walker pending action on the petition in the instant case. Because the two petitions seek review of the same judgment, the petitioner in Walker is a respondent in this case under Supreme Court Rule 12.6 and, if the Court grants review in this case, may file a brief on the merits.

"The word 'may,' when used in a statute, usually implies some degree of discretion." United States v. Rodgers, 461 U.S. 677, 706 (1983). Nothing in the statute contradicts that interpretation.

In light of the statute's grant of discretion to BOP in deciding which nonviolent offenders should receive early release, the question is whether BOP's implementation of the statute is a permissible one. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845 (1984); see also Reno v. Koray, 515 U.S. 50, 61 (1995). The Eighth Circuit correctly ruled that BOP relied on a "manifestly permissible construction of the statute" and appropriately exercised its discretion when it identified, as prisoners who would not be granted early release under 18 U.S.C. 3621(e)(2)(B), categories of prisoners convicted of nonviolent offenses within the meaning of the statute, but whose "underlying conduct indicates that they pose a serious risk to public safety." Pet. App. 1, at 4. The Ninth Circuit has reached the same conclusion. Bowen v. Hood, 202 F.3d 1211 (9th Cir. 2000) (deferring to BOP's permissible and reasonable exercise of discretion in interpreting Section 3621(e)(2)(B), petition for rehearing en banc pending (filed Feb. 17, 2000).

2. The Tenth and Eleventh Circuits have reached a contrary conclusion. Ward v. Booker, 202 F.3d 1249 (10th Cir. 2000); Kilpatrick v. Houston, 197 F.3d 1134 (1999) (per curiam), aff'g 36 F. Supp. 2d 1328 (N.D. Fla. 1999).[4] Both courts held that BOP's current regulation and program statement are invalid under circuit precedent that had held BOP's original regulation and program statement to be invalid (see pages 3-4, supra). Ward, 202 F.3d at 1254 (relying on Fristoe v. Thompson, 144 F.3d 627 (10th Cir. 1998)); Kilpatrick v. Houston, 36 F. Supp. 2d at 1330 (relying on Byrd v. Hasty, 142 F.3d 1395 (11th Cir. 1998)). The courts concluded that BOP's current regulation and program statement are not based upon a permissible construction of the statute, because Section 3621(e)(2)(B) states that prisoners convicted of nonviolent offenses are eligible for sentence reductions. Those courts reasoned that "any use of sentence enhancements to turn a conviction of a nonviolent offense into a violent offense for purposes of § 3621(e)(2)(B) [is]

[4] The government filed petitions for rehearing en banc in both Ward and Kilpatrick. Although the petition in Ward remains pending before the Tenth Circuit as of the date of this filing, on March 16, 2000, the Eleventh Circuit denied rehearing and rehearing en banc in Kilpatrick. Accordingly, the conflict in the circuits will persist absent this Court's intervention.

impermissible." Ward, 202 F.3d at 1256; see 36 Supp. 2d at 1329.[5]

3. The conflict in the circuits warrants resolution by this Court. BOP administers the early release program on a nationwide basis. During fiscal year 1999, 7473 prisoners were found eligible to participate in BOP's substance abuse treatment program. Of that number, 4166 prisoners were found eligible for early release and 3307 were not. During the same fiscal year, 2537 prisoners were granted early release under the incentive established in Section 3621(e)(2)(B). There has been a large volume of litigation in the lower courts surrounding the BOP's early-release policies, as the cases cited above demonstrate, see page 4, supra. The existence of conflicting criteria presents serious administrative difficulties to BOP. It also produces disparate treatment of similarly situated prisoners. The problem is exacerbated by the fact that a prisoner may seek review of BOP's determination in the district in which he is

[5] Petitioner asserts (Pet. 13-15) that the ruling below conflicts with the Sixth Circuit's decision in Orr v. Hawk, 156 F.3d 651 (6th Cir. 1998). That case involved a similar challenge by a prisoner deemed ineligible by BOP for early release under Section 3621(e)(2)(B), although on a slightly different basis, i.e. because he was convicted of being a felon in possession of a firearm. On the government's petition for rehearing, however, the Sixth Circuit modified its decision, see 172 F.3d 411 (6th Cir. 1999), to delete all references to BOP's current regulation and program statement and relied on BOP's former regulation and program statement. Accordingly, there is no conflict between the instant case and Orr.

presently being incarcerated. Since BOP transfers prisoners to facilities in different circuits as needed to preserve security and population balance, a single prisoner's eligibility for early release may change based on the location of his current place of incarceration. Finally, the incorrect conclusion of the Tenth and Eleventh Circuits that consideration for early-release is mandatory even for categories of prisoners that BOP has determined are not entitled to that benefit undermines the public-safety interests that BOP has sought to further with its interpretive approach. For all of those reasons, this Court should resolve the issue presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

THOMAS M. GANNON
Attorney

MARCH 2000

ORIGINAL

Supreme Court, U.S.
FILED
MAR 31 2000
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No. 99-7504

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

C.A NO. 99-1611
D.C. NO. 98-4223

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS,

Respondent.

SUPPLEMENTAL BRIEF OF THE PETITIONER

Mark V. Meierhenry
Danforth, Meierhenry
& Meierhenry, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075

Attorney for Petitioner

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8 pp

SUPPLEMENTAL BRIEF OF THE PETITIONER

The Petitioner, Christopher Lopez, by and through his appointed counsel of record, Mark V. Meierhenry, respectfully submits this Supplemental Brief to advise this honorable Court of the continued conflict between the Untied States Circuit Courts of Appeal.

* * * * *

On August 10, 1999, the Eighth Circuit Court of Appeals in *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999) held that the director of the Bureau of Prisons has the authority to categorically deny consideration for eligibility for early release as proscribed by 18 U.S.C. § 3621(e)(2)(B) to an inmate convicted of a nonviolent offense. Since that time, two other circuit courts have reaffirmed their opposition to the Eighth Circuit's and the Bureau of Prisons's (BOP) construction of 18 U.S.C. § 3621(e)(2)(B).

On January 19, 2000, the Tenth Circuit reaffirmed its position in *Ward v. Booker*, 202 F.3d 1249, 1254 (10th Cir. 2000) that the BOP may not categorically deny eligibility for sentence reductions based on sentence enhancement factors when an inmate is convicted of a non-violent offense. The Tenth Circuit specifically noted that the reasoning adopted by the Eleventh Circuit and several district courts was much more compelling than that of the Eighth Circuit. *Id.* at 1257.

Just months earlier, the Eleventh Circuit had rejected the BOP's construction of 18 U.S.C. § 3621(e)(2)(B),

affirming and adopting the decision of the district court in *Kilpatrick v. Houston*, 197 F.3d 1143, 1135 (11th Cir. 1999), *aff'g* 36 F.Supp.2d 1328 (N.D.Fla. 1999).

While the Tenth and Eleventh Circuits solidified their stands condemning the BOP's administration of Congress's early release program for rehabilitated inmates, the Ninth Circuit continues to rule the opposite direction, siding with the Eighth Circuit's decision in *Bellis*.

On February 4, 2000, the Ninth Circuit ruled in *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000) that the BOP was properly exercising its discretion in denying early release to inmates under similar circumstances to those present in *Bellis*.

As the Court will note, the circuits continue to disagree as to the BOP's authority regarding this issue, and there is no indication that the circuits will ever reconcile their positions. It is not as if one circuit is disagreeing with the vast majority of the other circuits on this issue. In fact, it is a 6-4 split between the circuits.

Ten circuit courts of appeals have had the opportunity to consider the validity of the BOP's categorically denying eligibility for early release to an inmate convicted of a nonviolent offense under 18 U.S.C. § 3621(e)(2)(B). Six of the ten circuits have ruled that the denial of eligibility is a proper exercise of the BOP's discretion.

The circuits that have sided with the BOP are:

Second: *Lasorsa v. Menifee*, 182 F.3d 900 (2nd Cir. 1999)(Table, Text in WESTLAW, 1999 WL 459773).

Fourth: *Pelissero v. Thompson*, 170 F.3d 442 (4th Cir. 1997).

Fifth: *Rublee v. Fleming*, 160 F.3d 213 (5th Cir. 1998).

Seventh: *Parsons v. Pitzer*, 149 F.3d 734 (7th Cir. 1998).

Eighth: *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999).

Ninth: *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000).

Four of ten circuits have concluded that the BOP has exceeded its statutory authority and frustrated Congress's intent by categorically denying eligibility for early release to inmates.

The circuits that have ruled that the BOP has exceeded its authority are:

Third: *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997).

Sixth: *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998).

Tenth: *Ward v. Booker*, 202 F.3d 1249, 1254 (10th Cir. 2000).

Eleventh: *Kilpatrick v. Houston*, 197 F.3d 1143, 1135 (11th Cir. 1999), *aff'g* 36 F.Supp.2d 1328 (N.D.Fla. 1999).

The circuits are virtually split down the middle. The interests of justice require that this Court reconcile the positions of the circuits with regards to 18 U.S.C. § 3621(e)(2)(B). As the law sits now, a year of an inmate's life is dependent on the circuit in which he was sentenced for his federal crime. If this Court does not decide the

question, inmates will continue to have their liberty determined merely by geography.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Dated this 28th day of March, 2000.

Mark V. Meierhenry
Danforth, Meierhenry & Meierhenry
315 South Phillips Avenue
Sioux Falls, SD 571204-6318
(605) 336-3075

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Brief of the Petitioner was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 28th day of March, 2000.

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Ted McBride
Craig P. Gaumer
Assistant United States Attorney
PO Box 5073
Sioux Falls, SD 57117-5073

For the Firm

Danforth, Meierhenry & Meierhenry
315 South Phillips Avenue
Sioux Falls, SD 571204-6318
(605) 336-3075

IN THE SUPREME COURT

OF THE

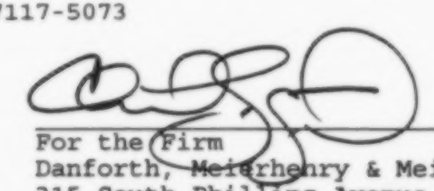
UNITED STATES OF AMERICA

CHRISTOPHER A. LOPEZ, Petitioner, v. RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and FEDERAL BUREAU OF PRISONS, Respondent.	NO. 99-7504 C.A NO. 99-1611 D.C. NO. 98-4223 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Supplemental Brief of the Petitioner was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 28th day of March, 2000.

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Ted McBride
Craig P. Gaumer
Assistant United States Attorney
PO Box 5073
Sioux Falls, SD 57117-5073



For the Firm
Danforth, Meierhenry & Meierhenry
315 South Phillips Avenue
Sioux Falls, SD 571204-6318
(605) 336-3075

Danforth, Meierhenry & Meierhenry, L.L.P.
Attorneys at Law

Mark V. Meierhenry
Todd V. Meierhenry
Sabrina S. Meierhenry
Robin J. Houwman
Clint Sargent

315 South Phillips Avenue
Sioux Falls, SD 57104-6318
Telephone: 605-336-3075
Fax: 605-336-2593

George J. Danforth
(1875-1952)
George J. Danforth, Jr.
(1909-1991)

99-7504

March 28, 2000

Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

RE: Christopher Lopez v. United States of America
C.A. No. 99-1611 D.C. No. 98-4223

Dear Clerk:

Enclosed for filing with regard to the above-entitled matter is a Supplemental Brief of the Petitioner. By copy of this letter, I am serving the Solicitor General and the United States Attorney.

Best regards,

Mark V. Meierhenry

MM/do

Enclosure

c: Solicitor General
Ted McBride/Craig Gaumer
Christopher Lopez

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SUPREME COURT, U.S.

JOINT

APPENDIX

GRANTED

(6)

Supreme Court, U.S.
FILED
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No. 99-7504

In The

Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

MARK V. MEIERHENRY*
CLINT SARGENT
DANFORTH, MEIERHENRY & MEIERHENRY, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075

Counsel for Petitioner

* *Counsel of Record*

SETH P. WAXMAN*
Solicitor General
Department of Justice
Washington, DC 20530-0001
(202) 514-2217

Counsel for Respondents

Petition For Writ Of Certiorari Filed December 15, 1999
Certiorari Granted April 24, 2000

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District of South Dakota, Southern Division

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United States Court of Appeals
for the Eighth Circuit

Relevant Docket Entries Case No. 99-1611

3/12/99 Prisoner Case Docketed Dist. Ct. Office; Sioux Falls, SD

* * *

8/10/99 THE COURT: James B. Loken, David R. Hansen, Morris S. Arnold. OPINION FILED by Morris S. Arnold PUBLISHED

8/10/99 JUDGMENT: James B. Loken, David R. Hansen, Morris S. Arnold: The judgment of the lower court is REVERSED and REMANDED in accordance with the opinion.

8/24/99 PETITION for REHEARING with Petition for Rehearing En Banc.

* * *

9/16/99 JUDGE ORDER: Denying Petition for Rehearing with Petition for Rehearing En Banc

---

P3 5330.10
CN-03 October 09, 1997
Attachment N, Page 1

(NOTIFICATION OF INSTANT OFFENSE DETERMINATION)

DATE: 12-17-98

REPLY TO: Jeanne [Illegible] (DAPC's Name)

TO: Frank [Illegible] (Unit Manager's Name)

SUBJECT: Lopez, Christopher (Inmate's Name)

05102-030 (Reg. No.)

PART 1 – INSTANT OFFENSE DETERMINATION

Instructions: Please mark an "X" in either response I or response II, and then go to Part 2 on the back.

X I. The inmate's instant offense is a crime that excludes him or her from early release under 18 U.S.C. § 3621(e). (If response I requires an "X" in either item A or B).

— A. Crime of Violence as contained in the Categorization of Offenses Program Statement.

X B. Crime listed under the Director's Discretion as contained in the Categorization of Offenses Program Statement.

— II. The inmate's instant offense is not a crime that excludes him or her from, early release under 18 U.S.C. § 3621(e).

SEE PART 2 ON BACK

PART 2. OTHER CRITERIA

Instructions: (Please mark an "X" in front of each true statement).

X 1. Inmate is not an INS Detainee.

X 2. Inmate is not a Pretrial Inmate.

X 3. Inmate is not a Contractual Boarder.

X 4. Inmate is not an "old law" inmate.

Explanation or other pertinent Information (e.g. inmate is both old law and new law)

_____

_____

_____

After Parts 1 and 2 are completed, sign and date the form, and return it to the DAPC as soon as possible.

Unit Manager (or designee) /s/ Illegible for

Date of Review
12-17-98

_____

NOTICE OF RESIDENTIAL DRUG ABUSE PROGRAM QUALIFICATION AND PROVISIONAL § 3621(e) ELIGIBILITY

TO: Christopher Lopez

FROM: Jeanne Morck /s/ J Morck

TITLE: **DAP Unit Administrator**

REG NO: 05102-030

INSTITUTION: FPC Yankton

DATE: 12-21-1998

SECTION 1 – RESIDENTIAL DRUG ABUSE PROGRAM QUALIFICATION

YOU HAVE REQUESTED PARTICIPATION IN THE BUREAU'S RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM. MY REVIEW OF YOUR CASE INDICATES THAT YOU **DO*/DO NOT MEET THE ADMISSION'S CRITERIA FOR THE RESIDENTIAL DRUG ABUSE PROGRAM. IT APPEARS THAT YOU DO/DO NOT QUALIFY TO PARTICIPATE IN THE RESIDENTIAL PROGRAM. (IF THE INMATE IS FOUND TO NOT QUALIFY, STATE THE REASON(S) BELOW).

_____

* Underlined italic words were circled in original.

Comments:

PS 5330.10
CN-03 10/9/97
Attachment J, Page 2

SECTION 2 – PROVISIONAL § 3621(E) ELIGIBILITY – TO BE COMPLETED ONLY IF THE INMATE HAS COMPLETED OR QUALIFIES FOR THE RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM.

FOR RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM GRADUATES TO BE ELIGIBLE FOR EARLY RELEASE, THEY MUST (DAPC must initial):

VF NOT BE AN INS DETAINEE.

VF NOT BE A PRE-TRIAL INMATE.

VF NOT BE A CONTRACTUAL BOARDER.

VF NOT BE AN "OLD LAW" INMATE.

~~VF~~ NOT HAVE A CURRENT CRIME THAT IS AN EXCLUDING OFFENSE IN BOP CATEGORIZATION OF OFFENSES POLICY (Mark an 'X' in the appropriate block below).

X NOT A CRIME OF VIOLENCE AS CONTAINED IN BOP CATEGORIZATION OF OFFENSES POLICY.

_ NOT AN EXCLUDING CRIME BY THE DIRECTOR'S DISCRETION IN CATEGORIZATION OF OFFENSES POLICY

X NOT HAVE ANY PRIOR FELONY OR MISDEMEANOR ADULT CONVICTION FOR HOMICIDE, FORCIBLE RAPE, ROBBERY, AGGRAVATED ASSAULT, OR SEXUAL ABUSE OF CHILDREN.

X UNDERSTAND THAT NEARING THE TIME OF YOUR RELEASE, THE WARDEN WILL DETERMINE IF YOU ARE ELIGIBLE FOR TRANSFER TO A COMMUNITY-BASED PROGRAM. IF YOU ARE NOT ELIGIBLE, YOU CANNOT COMPLETE THE COMMUNITY TRANSITIONAL SERVICES PORTION OF THE DRUG PROGRAM, AND THEREFORE, YOU MAY NOT RECEIVE A § 3621 (e) RELEASE.

MY CURRENT ASSESSMENT, IN CONSULTATION WITH YOUR UNIT TEAM, IS THAT IT DOES / *DOES NOT* APPEAR THAT YOU ARE PROVISIONALLY ELIGIBLE FOR AN EARLY RELEASE. IF NOT, LIST **ALL** THE REASON(S):

Comments: Director's Discretion

IF APPLICABLE, I UNDERSTAND THAT A DETERMINATION OF EARLY RELEASE FOR ME IS ALWAYS PROVISIONAL, *AND MAY CHANGE*.

INMATE'S SIGNATURE /s/ C Lopez

(indicate if refused to sign)

cc: Drug Abuse Treatment File
Unit Team (place in section 4 of inmate central file)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

***

> custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621 (e)(2)(B).

To interpret the statute, the BOP issued regulations in May 1995 defining "nonviolent offense" as the converse of crime of violence. 28 C.F.R. § 550.58 (1995). This 1995 regulation excluded from eligibility for early release under § 3621 (e)(2)(B) those inmates whose "current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924 (c)(3)." 28 C.F.R. § 550.58 (1995).[2] Section 924 (c)(3) defines a crime of violence as an offense that is a felony and that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

To implement this regulation, the BOP adopted Program Statement 5162.02, *Definition of Term, "Crimes of Violence"* (July 24, 1995). At paragraph 5, this program statement set out the statutory definition of "crime of

---

[2] An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligible for early release by a period not to exceed 12 months, in accordance with paragraph (a) of this section, . . . unless the inmate's current offense is determined to be a crime of violence as denied in 18 U.S.C. § 924(c)(3), or unless the inmate has a prior felony and/or state conviction for homicide, forcible rape, robbery or aggravated assault. 28 C.F.R. § 550.58 (1995).

violence" found in 18 U.S.C. § 924 (c)(3). At paragraph 9, the program statement states in part:

> Convictions for an offense listed below, [including possession of a listed chemical], . . . may or may not meet the crime of violence definition by involving the use, attempted use, or threatened use of force, or by presenting a substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offender Characteristics." This subsection references a particular United States Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Under this program statement, where an inmate was assessed two levels to his offense level for possession of a firearm under the Federal Sentencing Guidelines he was automatically classified as ineligible for early release, and his crime was regarded by the BOP as a crime of violence.

In *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), the Eighth Circuit ruled that the BOP exceeded its authority by considering the firearm enhancement in determining a prisoner's eligibility for early release under 18 U.S.C. § 3621 (e)(2)(B). *Id.* at 1080-81. The court stated:

> [T]he operative word in 3621 (e)(2)(B) is 'convicted,' thus requiring the BOP to look to the offense of conviction itself to determine whether it meets the definition of a 'nonviolent offense'; § 3621 does not address sentencing or sentencing enhancement factors.

Id. at 1079. The *Martin* court went on the say, "[a]lthough we agree that the BOP has discretion to determine which offenses will be eligible for consideration, we cannot agree that the BOP may disregard the plain language of the statute which speaks only to those 'convicted' of a nonviolent offense." *Id.* at 1080.

In so holding, the *Martin* court rejected the reasoning of *Venegas v. Henman*, 126 F.3d 760, 763-65 (5th Cir. 1997), wherein the Fifth Circuit addressed whether the BOP had properly classified inmates convicted under 18 U.S.C. § 922 (g) (felon in possession of a firearm) and 21 U.S.C. § 841 (b)(1) (drug possession with intent to distribute) as ineligible for consideration for early release under § 3621 (e)(2)(B). The Fifth Circuit held that "[t]he Bureau did not exceed its statutory authority by using its discretion to exclude from consideration for early release those prisoners convicted of possession of a weapon by a felon and offenses enhanced under the sentencing guidelines for possession of a weapon." *Id.* at 763. The *Venegas* court concluded that the operative words within section 3621 (e)(2)(B) are "may be reduced by the Bureau of Prisons," whereas the Eighth Circuit found that the statute requires the BOP to focus on the offense of conviction to establish eligibility for consideration for early release. *Martin* at 1080.

Prior to the Eighth Circuit's decision in *Martin*, on October 9, 1997, the BOP implemented the current regulations and program statement defining eligibility for the RDAP and early release. The regulatory section, 28 C.F.R. § 550.58, *Considerations for Early Release*, was amended to delete the reference to § 924(c)(3) and its definition of

crimes of violence. The amended regulation states, in part:

> As an exercise of the discretion vested in the Director of the Federal Bureau of prisons, the following categories of inmates are not eligible for early release: . . .
> (vi) Inmates whose current offense is a felony:
> (A) that has an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
> (B) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
> (C) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
> (D) that by its nature or conduct involves sexual abuse offenses committed upon children.

28 C.F.R. § 550.58.

Also on October 9, 1997, the BOP program statements were amended to reflect this change. A specific program statement called "Categorization of Offenses," Program Statement 5162.04, was added. Section seven lists the offenses that, in the Director's discretion, shall preclude an inmate from receiving certain BOP program benefits.[3]

---

[3] Section 7 states in relevant part:

OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN BUREAU PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621 (e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed

The list in section seven is the same as the above-quoted section of 28 C.F.R. § 550.58, *Considerations for Early*

---

in either this section or section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

Inmates whose current offense is a felony that:

- has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
- involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
- by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
- by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

. . .

b. Criminal Offense with a Specific Offense Characteristic Enhancement.

. . .

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force,

Release. This new program statement is applied to inmates either not participating in the RDAP as of October 9, 1997 or those who had not completed the RDAP by October 9, 1997. Like the previous program statement, the new one

---

and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Example: Section 841 of Title 21, United States code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

. . .

e. Special Circumstances

- *Title 18, United States Code § 922(g).* All offenses under 18 U.S.C. § 922(g) shall preclude an inmate from receiving certain Bureau program benefits.

categorically excludes inmates from eligibility for consideration based upon the assessment of a two point enhancement for weapon possession under the Federal Sentencing Guidelines.

Thus far, three Circuits have evaluated whether the BOP acted within its statutory authority in implementing the October 1997 regulation changes. The Sixth Circuit held that even though the BOP has eliminated the regulation's reliance on the meaning of "crime of violence" in § 924(c), under the new rule, the BOP continues to deny eligibility to those prisoners who have been convicted of nonviolent offenses in violation of § 3621(e)(2)(B). *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998). The court stated that "if the BOP cannot deny eligibility for consideration for early release to anyone who has committed a nonviolent offense, it can deny eligibility only to those who have committed a crime of violence." *Id.* at 655. Further, "the BOP cannot reasonably refuse to consider those convicted as felons in possession for early release under 3621(e)(2)(B)." *Id.* at 656. The other appellate courts that have considered this issue are the Fourth Circuit in *Pelissero v. Thompson*, 155 F.3d 470 (4th Cir. 1998) and the Seventh Circuit in *Bush v. Pitzer*, 133 F.3d 455 (7th Cir. 1997). Both the *Pelissero* and *Bush* courts, like the *Venegas* court, focused on the discretion afforded the BOP rather than on the elements of the offense of conviction as required by the *Martin* court. For example, in *Pelissero* the court stated:

> Congress entrusted the decision whether to grant inmates early release under 18 U.S.C. § 3621(e)(2)(B) "solely to the discretion and expertise of the BOP, with a cautions eye toward the public safety and welfare" *Pelissero*, 955 F. Supp. at 637. In exercising this discretion, the Bureau of Prisons must balance Congress's twin goals of providing an incentive for drug-addicted prisoners to undergo treatment while at the same time protecting the public from potentially violent criminals. We think that the 1997 revised version of 28 C.F.R. § 550.58 constitutes a reasonable interpretation designed to effect this objective.

Id. at 476-77 (citing *Bush* at 458 (upholding 1997 revised regulation on grounds that Bureau of Prisons may rationally deny early release to prisoners whose underlying conduct is violate or prone to violence)).

While it is true that the BOP may exercise a great deal of discretion in determining who among the eligible nonviolent offenders may be released, the BOP may not, in the first instance, exclude those convicted of nonviolent offenses from early release consideration.[4] Consistent with the Eighth Circuit's opinion in *Martin* and the Sixth Circuit's decision in *Orr*, it is the holding of this Court that the BOP has exceeded its authority by interpreting 18 U.S.C. § 3621 (e)(2)(B) in a manner inconsistent with the plain language of the statute. The 1997 revised program

---

[4] As stated by the Eighth Circuit in *Martin*, the Court has jurisdiction to review whether the BOP exceeded its statutory authority although the Court may not review the BOP's discretionary decision to deny a sentencing reduction. *Id.* at 1079 (citing *Wajda v. United States*, 64 F.3d 385, 388 (8th Cir. 1995) (court retains jurisdiction to determine whether Parole Commission exceeded statutory authority notwithstanding lack of jurisdiction to review substantive decision)).

statement does not correct the problems the Eighth Circuit found in the 1995 version because the BOP continues to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release under section 3621 (e)(2)(B). Both the former and revised program statements allow the BOP to categorically exclude inmates from consideration based upon sentencing factors or weapon possession, without regard to whether the underlying conviction was nonviolent.

At least two other district courts have held similarly. *See Hicks v. Brooks*, ___F. Supp.2d___, 1998 WL 817828 (D.Colo.); *Gavis v. Crabtree*, ___F. Supp.2d___, 1998 WL 842934 (D. Or.). In *Hicks*, the court explained:

> [i]n effect, the BOP has eliminated the definition of crime of violence from the 1997 revised regulation and incorporated into the revised regulation the language of the sentence enhancement for possession of a firearm, language that previously was in Program Statement 5162.02. By doing so, the BOP again has accomplished precisely what [the Tenth Circuit] said it may not, i.e., exclude categorically from consideration for early release upon completion of a drug treatment program those inmates convicted of a nonviolent offense who [sic] sentence was enhanced for possession of a weapon and, once again, convert a conviction for a nonviolent offense into a violent one by considering the sentence enhancement.

Id. at *5.

Although 18 U.S.C. § 3621 (e)(2)(B) does allow the BOP to exercise discretion to determine who, among the statutorily eligible inmates, should be granted early release, it cannot exercise its discretion to deny recognition of eligibility to those inmates statutorily eligible for consideration. In the first instance, under the language of § 3621 (e)(2)(B), *Martin*, and *Orr*, inmates convicted of nonviolent offenses must be deemed eligible for consideration for a sentence reduction. The exercise of discretion requires a careful consideration of each individual case. A categorical denial of all cases within one general group without individiaul examination is no exercise of discretion at all.

Conclusion

Based upon the foregoing analysis, the Court grants the petition and orders the BOP to reconsider Lopez's eligibility for early release in accordance with this opinion. Accordingly,

IT IS ORDERED

(1) that the petition filed by Christopher A. Lopez is granted.

(2) that the BOP will reconsider the eligibility of Christopher A. Lopez for early release under 18 U.S.C. § 3621(e)(2)(B) in accordance with this opinion.

Dated this 6th day of January, 1999.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
Chief Judge

ATTEST:

JOSEPH HAAS, CLERK
BY: /s/ Sharon Louro
(SEAL) DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

***

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Sharon Louro
(SEAL) DEPUTY

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 99-1203/1204/1205/1206/1207/1211/1212/1213/1214/1611

Calvern J. Bellis, Shon Pierson, Brian T. Shields, David J. Miller, Thane Martin, George Cook, Ryan Scott Clark, Sean A. Winston, Tim Walker, and Christopher A. Lopez,	*	
Appellees,	*	Appeals from the United States District Court for the District of South Dakota.
v.	*	
Randy J. Davis, Warden, Federal Prison Camp, Yankton, South Dakota; and Federal Bureau of Prisons,	*	
Appellants.	*	

Submitted: May 12, 1999

Filed: August 10, 1999

Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD; Circuit Judge.

In these consolidated appeals, ten federal prisoners petitioned for a writ of habeas corpus, *see* 28 U.S.C. § 2241(a), against the U.S. Bureau of Prisons (BOP) and Warden Randy Davis of the Federal Prison Camp in

Yankton, South Dakota. Each of the appellees has completed or is scheduled to complete the BOP's voluntary residential drug abuse treatment program, *see* 18 U.S.C. § 3621(b). The statute, *see* 18 U.S.C. § 3621(e)(2), authorizes the BOP to offer an early-release incentive to certain federal prisoners in order to encourage them to enroll in its voluntary drug abuse treatment program. The statute also provides that "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve," *see* 18 U.S.C. § 3621(e)(2)(B).

To implement the statute, the BOP promulgated regulations and a program statement which together define inmates' eligibility for the early-release incentive. *See* 28 C.F.R. § 550.58 and Federal Bureau of Prisons Program Statement 5162.04, (categorization of offenses) (Oct. 9, 1997). The regulations and the program statement identify two groups of offenses. The first consists of various federal offenses that the director of the BOP has determined to be "crimes of violence"; inmates convicted of these offenses are, by the terms of the statute, excluded from eligibility for the early-release incentive. *See* Federal Bureau of Prisons Program Statement 5162.04, §§ 1-2, §§ 5-6, § 9. The second is a group of crimes (called "director's discretion offenses") a conviction for which renders an inmate ineligible for the early-release incentive. *See* 28 C.F.R. § 550.58(a)(1)(iv), § 550.58(a)(1)(vi)(A), § 550.58(a)(1)(vi)(B), § 550.58(a)(1)(vi)(C), and Federal Bureau of Prisons Program Statement 5162.04, §§ 1-2, § 5,

§ 7, § 9. It is this second group of offenses that is at issue in this appeal.

The regulations pertaining to "director's discretion offenses" state, *inter alia*, that inmates convicted of "a felony . . . [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon" are not eligible for early release. *See* 28 C.F.R. § 550.58(a)(1)(vi)(B). Section 7 of the program statement identifies more particularly the offenses that the director of the BOP has decided will preclude eligibility for early release. Relying on the regulations and the program statement, the BOP determined that the appellees were ineligible for the early-release incentive, either because they had been convicted of being a felon in possession of a firearm, or because they had received a sentencing enhancement under the federal sentencing guidelines for possession of a dangerous weapon during the commission of a federal drug offense.

In their petitions to the district court, the appellees contended that the BOP exceeded its statutory authority by categorically excluding inmates who were not convicted of violent offenses from eligibility for the early-release incentive. The district court granted the appellees' petitions, and the BOP and the warden appeal. We disagree.

We have previously recognized that 18 U.S.C. § 3621(e)(2) vests broad discretion in the BOP to determine which individuals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release. *See Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998), *cert. denied*, 118 S. Ct.

2376 (1998). The statute states only that the prison term of an inmate convicted of a nonviolent offense "*may* be reduced by the Bureau of Prisons" (emphasis added), *see* 18 U.S.C. § 3621(e)(2)(B). The language is discretionary and does not mandate that the BOP grant a sentence reduction to any particular inmate or class of inmates. *Cf. Morgan v. Rabun*, 128 F.3d 694, 699 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1809 (1998) (finding "may" language in state statute discretionary). Under the plain language of this statute, "[c]ommission of a 'nonviolent offense' makes a prisoner eligible for consideration but does not . . . grant the boon he seeks. Eligibility is not entitlement." *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997).

Nor does the statute mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses. In fact, Congress expected the BOP to make early-release determinations "based on criteria to be established and uniformly applied," H.R. Rep. No. 103-320 (section-by-section analysis), 1993 WL 537335 (Nov. 3, 1993). It is well settled, moreover, that where Congress has left a gap in a statute for an agency to fill, we defer to the agency's interpretation so long as it is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 866 (1984); *see also Love*, 133 F.3d at 1069.

The BOP chose to exercise the discretion granted to it under the statute by identifying additional categories of inmates who are ineligible for the early-release program because, although their offenses may be "nonviolent" within the meaning of the statute, their underlying conduct indicates that they pose a serious risk to public

safety. We think that the BOP's decision to exclude these additional categories of inmates from eligibility represents a manifestly permissible construction of the statute and an appropriate exercise of the BOP's discretion.

The appellees contend that the BOP's current regulations and the program statement interpreting the relevant statutory language are contrary to our decision in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998). We disagree. In *Martin*, 133 F.3d at 1078, we examined the portion of the statute that limits eligibility for early release to nonviolent offenders, *see* 18 U.S.C. § 3621(e)(2)(B). In striking down an earlier set of regulations that attempted to interpret the statutory term "nonviolent offense," we held that the BOP must look to the offense of conviction, not to sentencing factors, in determining whether an offender was convicted of a "nonviolent offense" and thus eligible under the statute for the early-release incentive. *Martin*, 133 F.3d at 1079-81. We did not, however, address the question at issue in this appeal, namely, whether the BOP may, as an exercise of its discretion, *see* 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release. *Martin* is therefore of no relevance to the present case.

We conclude that the BOP acted within its authority in excluding the appellees from the early-release program under 18 U.S.C. § 3621(e)(2). We therefore reverse the district court's grant of the appellees' petitions, and

remand with instructions to enter judgment consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1203/1204/1205/1206/1207/
1211/1212/1213/1214/1611SDSF

Calvin Bellis, et al., Appellees, v. Rand[y] J. Davis, et al., Appellants.	•	Appeal from the United States District Court for the District of South Dakota

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 16, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 24, 2000

Mr. Mark V. Meierhenry
315 S. Phillips Avenue
Sioux Falls, SD 57104

Re: Christopher A. Lopez
v. Randy J. Davis, Warden, et al.
No. 99-7504

Dear Mr. Meierhenry:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

Sincerely,

William K. Suter, Clerk

---

(7)

Supreme Court, U.S.
FILED
JUL 05 2000
CLERK

No. 99-7504

In The

Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

MARK V. MEIERHENRY*
CLINT SARGENT
DANFORTH, MEIERHENRY & MEIERHENRY, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075
Counsel for Petitioner

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Congress granted the Director of the Bureau of Prisons the power to create categories of inmates who are ineligible for consideration for early release under 18 U.S.C. § 3621(e)(2)(B).

(2) Whether the Director of the Bureau of Prisons may categorically deny Mr. Lopez, a nonviolent offender, from consideration for eligibility for early release under 18 U.S.C. § 3621(e)(2)(B).

PARTIES TO THE ACTION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CALVERN J. BELLIS
SHON PIERSON
BRIAN TRACE SHIELDS
DAVID J. MILLER
THANE MARTIN
GEORGE COOK
RYAN SCOTT CLARK
SEAN A. WINSTON
TIM WALKER
CHRISTOPHER A. LOPEZ,

Petitioners/Appellees,

v.

RANDY J. DAVIS, Warden, Federal Prison Camp, Yankton; and
FEDERAL BUREAU OF PRISONS,

Respondents/Appellants.

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OPINIONS BELOW

On January 6, 1999, the Honorable Lawrence L. Piersol of the District of South Dakota, Southern Division, issued a Memorandum Opinion and Order granting the Petition for a Writ of Habeas Corpus to Petitioner Christopher A. Lopez. *Joint Appendix* at 8.

On August 10, 1999, the Court of Appeals for the Eighth Circuit reversed the decision of the District Court. *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999); *Id.* at 23. A Petition for rehearing and rehearing en banc was denied on September 16, 1999. *Id.* at 29.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner seeks review of the August 10, 1999 judgment of the Eighth Circuit Court of Appeals. *Joint Appendix* at 23. Petition for rehearing or rehearing en banc was denied by the Eighth Circuit on September 16, 1999. *Id.* at 23. A Petition for Certiorari was filed on December 15, 1999. Certiorari was granted by this Court on April 24, 2000. *Id.* at 30.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 18 U.S.C. § 3621(e)

§ 3621. Imprisonment of a convicted person.

* * *

e) Substance abuse treatment. –

(1) Phase-in. – In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare) –

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) Incentive for prisoners' successful completion of treatment program. –

(A) Generally. – Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) Period of custody. – The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

(3) Report. – The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain –

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of

prisoners with substance abuse problems are eligible; and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

(4) Authorization of appropriations. – There are authorized to be appropriated to carry out this subsection –

(A) $13,500,000 for fiscal year 1996;

(B) $18,900,000 for fiscal year 1997;

(C) $25,200,000 for fiscal year 1998;

(D) $27,000,000 for fiscal year 1999; and

(E) $27,900,000 for fiscal year 2000.

(5) Definitions. – As used in this subsection –

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set apart from the general prison population –

(i) directed at the substance abuse problems of the prisoner; and

(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems;

(B) the term "eligible prisoner" means a prisoner who is –

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program; and

(C) the term "aftercare" means placement, case management and monitoring of the participant in a community-based substance abuse treatment program when the participant leaves the custody of the Bureau of Prisons.

(6) Coordination of Federal assistance. – The Bureau of Prisons shall consult with the Department of Health and Human Services concerning substance abuse treatment and related services and the incorporation of applicable components of existing comprehensive approaches including relapse prevention and aftercare services.

2. 28 C.F.R. § 550.58 (1995).

See Appendix to Petitioner's Brief p. 1 ("App. 1").

3. 28 C.F.R. § 550.58 (1997).

See App. 3.

4. Bureau of Prisons Program Statement 5162.02 (July 24, 1995).

See App. 7.

5. Bureau of Prisons Program Statement 5162.04 (October 9, 1997).

See App. 29.

STATEMENT OF THE CASE

Christopher A. Lopez

The Petitioner, Christopher A. Lopez, was convicted of possession with intent to distribute methamphetamine. He is serving a 72-month sentence at the Federal Prison Camp in Yankton, South Dakota. Mr. Lopez is addicted to drugs.

Mr. Lopez requested treatment from the Bureau of Prisons for his substance abuse problem. Mr. Lopez was scheduled to enter the Bureau of Prison's (BOP's) Residential Drug Abuse Program. Congress requires the BOP to provide residential drug treatment to all federal prisoners with substance abuse problems. 18 U.S.C. § 3621(b). Lopez sought to take advantage of Congress's drug rehabilitation program, and the incentive provided by Congress for participation. Lopez hopes that by successfully completing the Residential Drug Abuse Program, he will qualify for a one-year sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B).

Lopez was informed that the BOP had classified him ineligible for the early release incentive under 28 C.F.R. 550.58 (1997) and BOP Program Statement 5162.04. *Joint Appendix* at 3, 5. Lopez was classified ineligible because he received a two-level sentence enhancement for possessing a firearm. *Id.*

Petitioner Lopez, along with nine other similarly situated prisoners, filed a petition seeking a writ of habeas corpus instructing the Warden of the Federal Prison Camp at Yankton, South Dakota to grant him a sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B).

The prisoners contention was that the BOP had exceeded the authority granted to it by Congress when the BOP ruled them categorically ineligible for sentence reductions under 18 U.S.C. § 3621(e)(2)(B). The prisoners contended they were eligible for consideration for a sentence reduction pursuant to 18 U.S.C. § 3621(e)(2)(B) because they had not been convicted of a violent offense. As authority for their position, they cited the Eighth Circuit's decision in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998).

Judge Piersol granted Mr. Lopez's petition on January 6, 1999. *Joint Appendix* at 8, 21. The Judge ordered the BOP to re-evaluate Lopez for early release. *Id.* at 8. The District Court concluded that the BOP exceeded its statutory authority by categorically declaring certain inmates who had not been convicted of violent offenses ineligible for the early release incentive. *Id.*

The government appealed the District Court's decision to the Eighth Circuit Court of Appeals. The Petitioner's case was consolidated with that of the nine other inmates. The case was decided on August 10, 1999, by Judges Loken, Hansen and Morris Sheppard Arnold of the United States Court of Appeals for the Eighth Circuit. *Joint Appendix* at 23. The Circuit Court concluded that the BOP acted within its statutory authority in excluding Lopez from the early release program. *Id.*

Lopez remains in prison. His anticipated release date from prison is June 2, 2002.

History of Title 18 U.S.C. § 3621(e)

Mr. Lopez requests the Court to interpret 18 U.S.C. § 3621(e). The statute represents Congress's efforts to provide effective substance abuse treatment to federal prisoners. Section 3621(e) created the present drug treatment program for federal prisoners. The statute is the product of Congress's crime legislation debated during the early 1990's.

The United States prison population in federal facilities increased from 21,266 in 1970 to 106,536 inmates in May 1998. Federal Bureau of Prisons *Quick Facts*, updated April 2000. The population had increased to 122,126 by April 2000. *Id.* The predominant reason for the increase has been the application of the Sentencing Guidelines to drug users. *Id.*

The BOP reports that in 1970 only 16.3% of federal inmates were imprisoned for drug related offenses. *Id.* The percentage of inmates in federal prison for drug related offenses was an astounding 58.9% by 1998. *Id.* The prison population of drug offenders in 1970 was 3,466. *Id.* The prison population of drug offenders has increased an average of 3,400 each year since then. *Id.*

The number of federal inmates convicted of drug offenses rose 361% over a 28-year period. *Id.* The increase does not include those inmates jailed for crimes not characterized as drug offenses but for which drugs played an integral role in the offense. *Id.*

Congress determined that treatment was needed to assist in the rehabilitation of addicted prisoners. Congress reacted in 1990. The Crime Control Act of 1990,

Pub. L. 101-647, § 2903, amended the existing 18 U.S.C. § 3621(b), and Congress required the BOP to provide drug treatment to the prisoners in its custody. 104 Stat. 4913. The statutory amendment provided: "The Bureau [of Prisons] shall, to the extent practicable, make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." *Id.*

Some members of Congress believed that the 1990 legislation was not adequate to ensure effective drug treatment. *See* H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991). House Bill 548 was introduced during 1991 to intensify drug treatment for prisoners. *Id.*

H.R. 548 expanded Congress's directive that the BOP shall provide substance abuse treatment to all prisoners in its custody with substance abuse problems. *Id.* The bill ordered the BOP to provide all eligible prisoners treatment by 1995. *Id.* The bill also directed that sentence reductions were to be provided to those prisoners who successfully completed the rehabilitation program. *Id.*

A hearing on H.R. 548 was held by the Subcommittee on Crime and Criminal Justice on June 6, 1991. *Id.* Testimony was presented by the Director of the Bureau of Prisons, Michael J. Quinlan, and other authorities. The testimony demonstrated that substance abuse was a major cause of the overwhelming growth in the prison population during the 1980s. *Id.* The Subcommittee was informed that no substance abuse program would be successful without incentives for participation. *Id.*

The Judiciary Committee adopted H.R. 548, as submitted by the Subcommittee on Crime and Criminal Justice, and incorporated it into H.R. 3371, the Omnibus Crime Control Act of 1991 (renamed "Violent Crime Control and Law Enforcement Act of 1991"). *Id.* The Judiciary Committee endorsed the bill, stating that:

> There is an immense gap between what could be done to prevent crime with drug treatment and what is now being done by the Bureau of Prisons. . . . [A review of the evidence presented to the Subcommittee on Crime and Criminal Justice made it] clear that an incentive to participate in these rigorous treatment programs was essential. For that reason, a provision was included in [the bill] authorizing the Bureau of Prisons to reduce by up to one year the sentences of inmates completing a residential substance abuse program. . . . The Committee determined that a modest, appropriate incentive is necessary to ensure a high level of productive participation in the program.

Id.

H.R. 3371 passed the House of Representatives on November 27, 1991. H.R. Rep. No. 320, 103rd Cong., 1st Sess. 5 (1993). The Senate never voted on it, however, and it failed to become law. *Id.*

In spite of the Senate's failure to vote on the issue, the effort to provide drug treatment to federal prisoners continued in 1993. *Id.* An initiative to provide drug treatment to federal prisoners was again adopted by the House Judiciary Committee in 1993 as a separate bill,

H.R. 3350.[1] *Id.* This bill was substantially similar to H.R. 548, which the Judiciary Committee reported on in 1991. *Id.*

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[1] H.R. 3350 provided:

SECTION 1. SUBSTANCE ABUSE TREATMENT IN FEDERAL PRISONS.

Section 3621 of title 18, United States Code, is amended –

(1) in the last sentence of subsection (b), by striking ", to the extent practicable,"; and

(2) by adding at the end the following new subsection:

"(e) Substance Abuse Treatment. –

"(1) Phase-in. – In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall provide substance abuse treatment –

"(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

"(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

"(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

"(2) Incentive for prisoners' successful completion of treatment program. –

"(A) Generally. – Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provide under paragraph (1) of this subsection, shall remain in the custody of the Bureau for such time (as limited by subparagraph (B) of this paragraph) and under such conditions,

The House Judiciary Committee once again concluded that residential drug treatment programs for

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as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

"(B) Period of custody. – The period the prisoner remains in custody after successfully completing a treatment program shall not exceed the prison term the law would otherwise require such prisoner to serve, but may not be less than such term minus one year.

"(3) Report. – The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain –

"(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

"(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible, and

"(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

"(4) Authorization of appropriations. – There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out this subsection.

"(5) Definitions. – As used in this subsection –

"(A) the term 'residential substance abuse treatment' means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set forth from the general prison population –

federal prisoners were necessary to reduce recidivism, ease prison overcrowding and ultimately prevent crime. *Id.* at 2. The Committee maintained the position that an incentive was necessary to ensure prisoners' participation, and thus, accomplish the legislation's goals. *Id.*

H.R. 3350 was subsequently included in a larger crime bill, the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355, 103rd Congress, 2nd Sess. (1994) (enacted). This Act was debated and amended throughout 1994. *See* H.R. Rep. No. 489, 103rd Cong., 2nd Sess. (1994); H.R. Conf. Rep. Nos. 694, 711 103rd Cong., 2nd Sess. (1994). The amendments did include a revision of that portion of the act dealing with substance abuse treatment in federal prisons. H.R. Conf. Rep. No. 694.

The version of the bill reported out May 2, 1994 was the same as H.R. 3350 relating to drug treatment. H.R. Rep. No. 489. However, House Conference Report No. 694 dated August 10, 1994, illustrates the amendments that were made to the bill prior to passage by both houses of Congress. This amended version of the bill is what

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"(i) directed at the substance abuse problems of the prisoner; and

"(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems; and

"(B) the term 'eligible prisoner' means a prisoner who is –

"(i) determined by the Bureau of Prisons to have a substance abuse problem; and

"(ii) willing to participate in a residential substance abuse treatment program." H.R. Rep. No. 320 at 5.

became 18 U.S.C. § 3621(e). H.R. 3355, 103rd Cong., 2nd Sess. (1994) (enacted).

There were two amendments to the bill before final passage that are vital to the proper resolution of Mr. Lopez's case.

The first noteworthy amendment was to subsection (e)(2)(A). The previous versions of the bill provided that a prisoner "shall remain in the custody of the Bureau for such time (as limited by subparagraph (B) of this paragraph) and under such conditions, as the Bureau deems appropriate." H.R. Rep. No. 320. The BOP had full discretion on the length of a prisoner's sentence. In the amended version, "for such time" was deleted, reducing the BOP's discretion. The bill no longer provided that the time a prisoner was to remain in prison was to be "for such time . . . as the Bureau deems appropriate." H.R. Conf. Rep. No. 694. The discretion granted by the bill changed.

Second, the amended version provided that only prisoners convicted of nonviolent offenses would be eligible for the early release incentive. *Id.*

The Violent Crime Control and Law Enforcement Act of 1994 was enacted on September 13, 1994, as Pub. L. 103-322. Section 32001(2) of Pub. L. 103-322 added section (e) to 18 U.S.C. § 3621 and created the current substance abuse treatment program for federal prisoners. 108 Stat. 1796, 1896.

Almost immediately after enactment of 18 U.S.C. § 3621(e), the BOP began interpreting the statute in a

manner inconsistent with the plain meaning of the statute. The BOP enacted 28 C.F.R. § 550.58 in May 1995, which interpreted Congress's proviso that only those inmates convicted of nonviolent offenses were eligible for a sentence reduction. App. 1. The BOP defined a nonviolent offense as the converse of a crime of violence as defined in 18 U.S.C. § 924(c)(3). *Id.* The BOP then adopted Program Statement 5162.02 (July 24, 1995) to implement the regulation. App. 7.

The Program Statement, entitled *Definition of Term, "Crimes of Violence,"* listed those crimes that, according to the BOP, are always crimes of violence. Section 7; App. 9-15. The Program Statement also stated that some crimes may be considered crimes of violence depending on the specific offense characteristics assigned. Section 9; App. 17-21. The most notable inclusion in this paragraph was the BOP's classification of a conviction for drug trafficking under 21 U.S.C. § 841 as a crime of violence if the defendant received a sentence enhancement for possession of a firearm pursuant to Sentencing Guidelines § 2D1.1 and § 2D1.11. *Id.* This triggered a flood of litigation because a conviction under 21 U.S.C. § 841 had never been characterized as a crime of violence. *See e.g., Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998); *Bush v. Pitzer*, 133 F.3d 1066 (7th Cir. 1997); *Venegas v. Henman*, 126 F.3d 760 (5th Cir. 1997); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996). Prisoners argued that the BOP had exceeded its authority by defining the phrase "crime of violence" in a manner inconsistent with existing statutory and case law. *Id.* The

prisoners contended that the BOP could not use sentencing factors to determine the nature of a prisoner's conviction. The courts agreed, and the majority of circuits held that the BOP had exceeded its authority by using sentencing factors to determine whether a conviction was for a crime of violence, and thus, not nonviolent. *Martin*, supra; *Bush*, supra; *Roussos*, supra; *Downey*, supra.

The BOP responded to the courts' rejection of Program Statement 5162.02 by amending 28 C.F.R. § 550.58 and adopting Program Statement 5162.04 (October 9, 1997). App. 3, 29. The BOP's present position is that because an enhancement cannot be used to classify drug possession as a crime of violence, the Director will use his discretionary power to exclude that same group of prisoners based on the discretion of the Director. Section 7; App. 40-53. The BOP maintains certain prisoners are categorically excluded from the incentive program based upon the Director's discretion. *Id.*

The interpretation by the BOP has created a new division of the circuits. Nine courts of appeal have considered the issue of whether the BOP has discretion to categorically exclude inmates like Petitioner Lopez who have not committed a crime of violence. *See Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999); *Lasorsa v. Menifee*, 182 F.3d 900 (2nd Cir. 1999) (Table, Text in WESTLAW, 1999 WL 459773); *Pelissero v. Thompson*, 170 F.3d 442 (4th Cir. 1997); *Rublee v. Fleming*, 160 F.3d 213 (5th Cir. 1998); *Parsons v. Pitzer*, 149 F.3d 734 (7th Cir. 1998); *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998); *Ward v. Booker*, 202 F.3d 1249, 1254 (10th Cir. 2000);

Kilpatrick v. Houston, 197 F.3d 1143 (11th Cir. 1999), *aff'g* 36 F.Supp.2d 1328 (N.D.Fla. 1999).

The Director of the BOP contends that she has total discretion to determine whether Petitioner Lopez warrants individual consideration for the incentive program. App. 40-53. Mr. Lopez is categorically ineligible even though he has no violent conviction.

SUMMARY OF ARGUMENT

Congress established an expansive substance abuse program to be administered by the Bureau of Prisons. Congress enacted an incentive for inmates to take advantage of the programs. Congress directed that all inmates who were not convicted of a violent offense were to be considered for an early release incentive for completion of the residential drug abuse program.

The Bureau of Prisons through its rulemaking has declared nonviolent offenders categorically ineligible for the incentive of early release. This action by the Bureau of Prisons is in direct violation of Congress's intention. The statute unambiguously directs that all nonviolent offenders are eligible for consideration for an early release incentive. The Court need give no deference to the interpretation of the Bureau of Prisons because the intent of the statute is clear.

The Bureau of Prisons may not create categories of ineligible prisoners beyond the one category established by Congress in the absence of law clearly granting the Bureau of Prisons that authority.

The Court should reverse the Eighth Circuit Court of Appeals and hold that the statute does not grant the Bureau of Prisons the power to categorically deny an inmate convicted of a nonviolent offense consideration for eligibility for early release.

ARGUMENT

I. THE BUREAU OF PRISONS' CATEGORICAL DENIAL OF ELIGIBLITY FOR EARLY RELEASE TO MR. LOPEZ VIOLATES THE PLAIN LANGUAGE OF 18 U.S.C. § 3621 AND THE UNAMBIGUOUSLY EXPRESSED INTENT OF CONGRESS.

"Congress 'says in a statute what it means and means in a statute what it says.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, ___ U.S. ___, 120 S. Ct. 1942, 1947 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Congress has said: "that every prisoner with a substance abuse problem [shall] have the opportunity to participate in appropriate substance abuse treatment . . . " 18 U.S.C. § 3621(c)(1).

Congress has said: "the term 'eligible prisoner' means a prisoner who is (i) determined by the Bureau of Prisons to have a substance abuse problem; and (ii) willing to participate in a residential substance abuse program." 18 U.S.C. § 3621(e)(5)(B).

Congress has further said: "The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be

reduced by the Bureau of Prisoners, but such reduction may not be more than one year." 18 U.S.C. § 3621(e)(2)(B).

Congress meant that all prisoners are eligible for a sentence reduction incentive except (a) those who do not have a substance abuse problem, (b) those who have a problem but are unwilling to participate, or (c) those convicted of violent offenses.

Mr. Lopez has a substance abuse problem, wants to complete the substance abuse program to qualify for consideration for a sentence reduction, and was not convicted of a violent offense.

Congress, by stating which inmates are eligible, has declared which inmates are not. *Arthur v. Cumming*, 91 U.S. 362, 364 (1876) ("Expressio unius, exclusio alterius"). This statute is not ambiguous and no deference need be given to the agency interpretation. *United States v. LaBonte*, 520 U.S. 751 n6 (1997). Mr. Lopez is eligible for early release by the plain language of 18 U.S.C. § 3621(e).

A. The plain language of 18 U.S.C. § 3621(e), and specifically subsection (2)(B), illustrates Congress's intent that only those prisoners convicted of violent offenses should be excluded from consideration for the sentence reduction incentive.

The precise question at issue is "Who should be categorically excluded from eligibility for the sentence reduction?" Lopez submits that Congress explicitly answered this question in the plain language of 18 U.S.C. § 3621(e).

Subsection 3621(e)(2)(B) is Congress's one-year sentence reduction incentive for successful completion of

residential drug treatment.[2] This subsection grants eligibility for early release consideration to all prisoners convicted of nonviolent offenses.[3] It specifically refers to those prisoners "convicted of a nonviolent offense." The plain language of the statute is clear that those prisoners convicted of violent offenses are ineligible for a sentence reduction. Congress categorically excluded violent offenders. Congress has mandated that all other inmates are eligible upon completion of the program requirements.

The BOP contends that Congress has granted the Director of the BOP broad discretion to also determine who is categorically ineligible for early release. *See* Program Statement 5162.04; App. 29. A specific grant of authority is absent from Subsection 3621(e)(2)(B). The only reference to the BOP in Subsection 3621(e)(2)(B) is Congress's grant to the BOP of the authority to reduce sentences. The subsection states that sentences "may be reduced by the Bureau of Prisons, but such reduction

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[2] Title 18 U.S.C. § 3621(e)(2)(B) provides:

> (2) Incentive for prisoners' successful completion of treatment program. – * * *
>
> (B) Period of custody. – The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

[3] Petitioner Lopez was convicted of possession with intent to distribute methamphetamine. The BOP considers this a conviction for a nonviolent offense. *See* Program Statement 5162.04 (October 9, 1997) at App. 29.

may not be more than one year." The purpose of this subsection was to authorize the BOP to grant sentence reductions.

The BOP could not grant sentence reductions prior to 1994 because Congress had prohibited such reductions in 18 U.S.C. § 3621(a). Subsection (a) of 18 U.S.C. § 3621 provides that a person who has been sentenced by a court to a term of imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." The BOP is required to keep federal prisoners in custody until the term of imprisonment, as set by the sentencing judge, is completed. *Id.* Thus, Congress needed to enact Subsection (e)(2)(B) to permit the incentive to be granted to prisoners. Prior to the enactment of Subsection (e), the BOP could not reduce sentences upon successful completion of drug treatment. *See* § 3621(a). Section 3621(e)(2)(B) did not grant the BOP authority to determine who is ineligible for sentence reductions by creating the power to grant incentives. The power granted was to give reductions not the power to decide who was eligible to receive reductions.

Furthermore, a review of 18 U.S.C. § 3621 in its entirety does not support the broad grant of authority upon which the BOP relies. Subsection 3621(e)(2)(A) grants the BOP the power to alter the conditions of confinement of an inmate who has successfully completed

drug treatment as the Bureau deems appropriate.[4] The section does not modify the early release incentive. The subsection states that the determination of whether an inmate has successfully completed the residential substance abuse treatment program is left to "the judgment of the Director of the Bureau of Prisons." *Id.* Language relating to the Director's "judgment" is limited to only the determination of whether an inmate successfully completed the program.

The Court need only ask a few questions to determine whether Congress has spoken directly to the precise question at issue. The answers to the following questions make the proper interpretation of the statute quite clear:

- Does 18 U.S.C. § 3621 specifically state that federal prisoners shall receive drug treatment?

  Yes. *See* 18 U.S.C. § 3621(b).

[4] Title 18 U.S.C. § 3621(e)(2)(B) provides:

(2) Incentive for prisoners' successful completion of treatment program. –

(A) Generally. – Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

- Does 18 U.S.C. § 3621 specifically state that the BOP may give incentives for the prisoners' successful completion of drug treatment?

  Yes. *See* 18 U.S.C. § 3621(e)(2)(A)&(B).

- Does 18 U.S.C. § 3621 specifically state that a prisoner convicted of a nonviolent offense may have his sentence reduced?

  Yes. *See* 18 U.S.C. § 3621(e)(2)(B).

- Does 18 U.S.C. § 3621 specifically state that the BOP may, in its discretion, classify other classes of inmates as categorically ineligible?

  No.

Congress gave the BOP the power to determine whether an inmate had successfully completed drug treatment. 18 U.S.C. § 3621(e)(2)(A). Congress granted the BOP the power to keep inmates who successfully completed treatment in custody under conditions the BOP deems appropriate. *Id.* Congress also gave the BOP the power to grant sentence reductions which it did not have. 18 U.S.C. § 3621(e)(2)(B). If Congress wanted the BOP to reduce the categories of inmates eligible for the early release incentive (beyond the one identified by Congress), Congress would have specifically placed this grant of authority in the language of the statute. The fact that Congress did just that in granting the BOP the specific powers listed above proves this point.

The proper inference to be drawn is that Congress considered all the authority that could possibly be granted to the BOP with respect to the drug treatment programs. Congress then specifically listed that authority

which it intended to grant and omitted that authority which it did not intend to grant. *U.S. v. Johnson*, ___ U.S. ___, 120 S. Ct. 1114, 1118 (2000).

The Court need not look beyond the plain language of the statute to answer the threshold question in this analysis. Congress has directly spoken on the issue of who is eligible for consideration for the early release incentive of 18 U.S.C. § 3621(e)(2)(B).

The plain language of the statute illustrates that only those inmates convicted of violent offenses are categorically ineligible for early release, and therefore, Petitioner Lopez is eligible for consideration.

B. The incentive of a one-year sentence reduction was an indispensable element of the overall drug treatment program for federal prisoners and illustrates Congress's intent that only those prisoners convicted of violent offenses should be excluded from consideration for the incentive.

The legislative history of 18 U.S.C. § 3621(e) makes clear its purpose: Congress wanted to persuade all federal prisoners with substance abuse problems to successfully complete rehabilitation programs. Congress's goal was to reduce criminal recidivism. H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991); H.R. Rep. No. 320, 103rd Cong., 1st Sess. 5 (1993). The legislative history records the empirical data placed before Congress. *Id.* The data convinced Congress that providing incentives for participation in drug treatment programs was essential. *Id.* The legislative history is also highlighted by two

amendments to the legislation that ultimately became 18 U.S.C. § 3621(e). *Compare*, H.R. Rep. No. 489, 103rd Cong., 2nd Sess. (1994); H.R. Conf. Rep. Nos. 694 103rd Cong., 2nd Sess. (1994). First, Congress determined that all prisoners convicted of nonviolent offenses should be eligible for the sentence reduction incentive. *Id.* Second, Congress limited the BOP's discretion in determining periods of custody. *Id.* A review of the legislative history as a whole reveals that Congress never intended to grant the BOP the discretion to categorically exclude nonviolent inmates from consideration for a sentence reduction.

1. Congress made it clear that incentives were indispensable to the success of the drug treatment program.

Congress was well aware of the necessity of providing incentives to encourage drug treatment.

House of Representatives Report from the Committee on the Judiciary No. 102-242(I) documents the data Congress reviewed concerning substance abuse. The information presented to Congress suggested drug treatment as an effective method of crime prevention. *Id.* This data was compiled while the House Subcommittee on Crime and Criminal Justice was considering the first bill that carried the sentence reduction incentive, H.R. 3371, 102nd Cong., 1st Sess. (1991). *Id.*

The Judiciary Committee highlighted the importance of the following evidence presented to its Subcommittee:

> [S]ubstance abuse is a major cause of the tremendous growth in the Federal prison population over the past decade. Michael J. Quinlan,

> Director of the Federal Bureau of Prisons, testified at the hearing [before the Subcommittee] an estimated 30,000 of the 62,000 Federal inmates have substance abuse problems. Without treatment, studies indicate as many as 75 percent of these individuals will return to drug use within three months of release from prison, and about half will return to jail within three years. In contrast, the comprehensive Stay'N Out program at New York's Arthur Kill Correctional Facility has found that 78 percent of those inmates who undergo the full residential substance abuse treatment are still out of prison three years after release.

H.R. Rep. No. 242(I), 102nd Cong., 1st Sess. (1991).

The Judiciary Committee made the following conclusions after a review of the evidence with regard to offering incentives to inmates:

> Based upon the evidence presented at the hearing, it became clear that *an incentive to participate in these rigorous treatment programs was essential.* For that reason, a provision was included in this title authorizing the Bureau of Prisons to reduce by up to one year the sentences of inmates completing a residential substance abuse program. Three graduates of the Stay'N Out program testified at the hearing. They testified that prisoners induced by the prospect of an incentive to enter a substance abuse program often find in the program the support and resolve they need to overcome their drug problems. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort, and commitment from the inmate. The Committee determined that a modest,

> appropriate incentive is necessary to ensure a high level of productive participation in the program.

Id. (Emphasis added).

These findings and conclusions of the 102nd Congress were carried forward into the 103rd Congress. The Judiciary Committee reaffirmed the position of the Committee for the 102nd Congress and drafted House Report No. 320 to comment specifically on residential substance abuse treatment in federal prisons. The Committee echoed its previous findings:

> The link between substance abuse and crime is well-established. Drug addiction can increase an offender's rate of predatory criminal activity by 800 percent. . . . It is the Committee's belief that releasing an inmate into the community without treating his or her substance abuse problem while the inmate is in custody is to virtually guarantee future crime. . . . Since the Bureau of Prisons began its current substance abuse treatment program in 1990, it has treated only 6,000 of the more than 100,000 inmates who have been incarcerated in Federal institutions during that period. There is an immense gap between what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons.

H.R. Rep. No. 320, 103rd Cong., 1st Sess. at 2-3 (1993).

The Committee again commented specifically on the necessity of incentives to promote participation in the prison treatment programs:

H.R. 3350 also provides that the Bureau of Prisons may reduce, by up to one year, the sentence of an inmate who successfully completes the treatment program. The Committee believes such an incentive is necessary to draw into treatment many inmates who may otherwise not be willing to undergo a difficult and painful treatment program. Residential substance abuse programs are rigorous, 24-hour-a-day experiences requiring a great deal of work, effort, and commitment from the participants. The experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life opportunities, and will undertake to complete the program.

Id. at 4.

The legislative history of 18 U.S.C. § 3621(e) outlines the clear statistical data linking incentives for participation in drug treatment to successful drug treatment, which results in crime prevention. The incentive contained in 18 U.S.C. § 3621(e)(2)(B) was of monumental importance in the overall plan to provide inmates with drug treatment. The history illustrates a Congress disappointed by the BOP's lack of an effective drug treatment program.[5] The history illustrates a Congress intent on changing the system of drug treatment. Congress reviewed a system of drug treatment administered by the BOP with only 6,000 of the more than 50,000 inmates with

[5] "There is an immense gap between what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons." H.R. Rep. No. 320 at 3-4.

drug problems in treatment. *Id.* at 3. Congress did not intend for the BOP to establish categorical restrictions to reduce rather than increase drug treatment incentives. The history prior to the summer of 1994 indicates that Congress wanted the BOP to consider every inmate for a sentence reduction because the incentive would get the inmate through treatment and reduce his potential to re-offend.

2. The amendments to the bill evidence Congress's intent to limit the BOP's discretion.

The House and Senate debated the bill that would become 18 U.S.C. § 3621(e) throughout the summer of 1994. Congress specifically addressed the issue of which inmates should be eligible for the incentive program. The initial version of the proposed statute did not place any restrictions on inmate's eligibility. *See* H.R. Rep. No. 489. The bill was then amended in the summer of 1994 to its current state. *See* H.R. Conf. Rep. No. 694. Prisoners convicted of violent offenses would not be eligible.

Congress limited eligibility to a single category of inmates; "a prisoner convicted of a nonviolent offense." *Id.* Given the BOP's said history of drug treatment, Congress demanded widespread participation. Congress found that treating all drug abusers under BOP's control would reduce crime. Congress obviously realized that certain violent offenders must not be released early, however. Therefore, Congress made a specific exception to its overall policy that all prisoners should be given an incentive to participate in the drug program.

"When Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *U.S. v. Johnson*, ___ U.S. ___, 120 S. Ct. 1114, 1118 (2000). The proper inference is that "Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Id.* Congress categorically excluded only inmates convicted of violent offenses because Congress wanted all prisoners to participate, and thereby, reduce crime in the future.

Another amendment that was made in the summer of 1994 was to delete the sentence reduction language from 18 U.S.C. § 3621(e)(2)(A). The pre-amendment version stated that a prisoner "shall remain in the custody of the Bureau *for such time* . . . and under such conditions, as the Bureau deems appropriate." H.R. Rep. No. 320. (emphasis added). The version reported in H.R. Conf. Rep. No. 694, which became 18 U.S.C. § 3621(e)(2)(A), states that a prisoner "shall remain in the custody of the Bureau under such conditions, as the Bureau deems appropriate." The amended and final version of that subsection makes no reference to the BOP having the authority to determine the length of time a prisoner will remain in custody after successful completion of the program. Discretion that was in the bill was removed by Congress prior to passage of the bill. This is further evidence of Congress denying the BOP discretion to determine prisoner eligibility for a sentence reduction.

The BOP claims that the word "may" in Subsection (e)(2)(B) grants the Director the same authority granted to her in (e)(2)(A). Subsection (A) grants the Director broad discretion in the management of the program using the terms "in the judgment of the Director" and "under such

conditions as the Bureau deems appropriate." Subsection (B) does not grant broad discretion similar to Subsection (A). Congress directed that the period of imprisonment of a nonviolent offender "may be reduced." This grant permits and assumes a reduction, but does not so require. Most importantly, the language has no grant of power to determine eligibility. No words allow the Director to limit eligibility to those she "deems appropriate" as in subsection (A).

The BOP urges the Court to find that in subsection (A), Congress's use of language such as "Director's judgment" and "deems appropriate" is equivalent to the use of the word "may" in subsection (B) and that Congress intended to grant the same authority in each. This Court has said that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 21 (1983) (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). In *Russello*, the Court went on to state: "We refrain from concluding here that the differing language in the two [consecutive] subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." The BOP is asking this Court to stray down the same path the Court refused to follow in *Russello*.

Both the amendment limiting eligibility for the sentence reduction and the amendment limiting the BOP's discretion demonstrate a clear intent by Congress to direct the BOP to enhance drug treatment efforts.

A comprehensive review of the legislative history demonstrates the importance Congress placed on the sentence reduction incentive. Congress was insistent on making determinations regarding eligibility for its programs, and Congress wanted to be very specific in the authority it granted to the BOP. Congress spoke directly to the question at issue in this case. Congress did not grant the Director of the BOP the authority to categorically exclude Petitioner Lopez from consideration for early release.

II. THE RULE OF LENITY APPLIES TO THE INTERPRETATION OF 18 U.S.C. § 3621(e)(2)(B) IF CONGRESS'S INTENT IS DETERMINED TO BE AMBIGUOUS.

The rule of lenity is a rule of statutory construction which provides that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when the intent of Congress is ambiguous. *Ladner v. U.S.*, 358 U.S. 169, 178 (1958). "The rule of lenity . . . applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz v. U.S.*, 350 U.S. 333, 342 (1981). The rule reflects " 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' " *U.S. v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, Benchmarks 209 (1967)).

Should this Honorable Court determine that Congress's intent is ambiguous as it relates to the sentence reduction contained in 18 U.S.C. § 3621(e)(2)(B), then the

Court should apply the rule of lenity and adopt the interpretation that favors the federal prisoner.

CONCLUSION

Petitioner Lopez respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit Court of Appeals and order the Bureau of Prisons to consider Mr. Lopez for a sentence reduction in accordance with the Memorandum Opinion and Order of the District Court.

Dated this 27th day of June, 2000.

Respectfully submitted,

MARK V. MEIERHENRY
CLINT SARGENT
DANFORTH, MEIERHENRY & MEIERHENRY
315 South Phillips Avenue
Sioux Falls, SD 57104-6318
(605) 336-3075

Counsel for the Petitioner

APPENDIX

28 C.F.R. § 550.58 (1995) ..... App. 1

28 C.F.R. § 550.58 (1997) ..... App. 3

Bureau of Prisons Program Statement 5162.02 (July 24, 1995) ..... App. 7

Bureau of Prisons Program Statement 5162.04 (October 9, 1997) ..... App. 29

28 C.F.R. § 550.58 (1995)

§ 550.58 Consideration for early release.

An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligible for early release by a period not to exceed 12 months, in accordance with paragraph (a) of this section, unless the inmate is an INS detainee, a pretrial inmate, a contractual boarder (for example, a D.C., State, or military inmate), or eligible for parole, or unless the inmate's current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3), or unless the inmate has a prior federal and/or state conviction for homicide, forcible rape, robbery, or aggravated assault.

(a) Eligibility.

(1) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:

(i) Staff confirm that the completed program matches the treatment required by statute;

(ii) The inmate signs an agreement acknowledging his/her program responsibility;

(iii) The inmate completes a refresher treatment program and all applicable transitional services programs; and

(iv) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act

and has not been found to have committed a prohibited act involving alcohol or drugs.

(2) An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if:

(i) The inmate completes all applicable transitional services programs; and

(ii) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(b) Application.

(1) Inmates currently enrolled. Eligible inmates currently enrolled in a residential drug abuse treatment program shall automatically be considered for early release.

(2) Inmates who had previously completed program requirements. Eligible inmates who have previously completed a residential drug abuse treatment program (or which matches the treatment required by statute) must notify the institution's drug abuse program coordinator via a Request to Staff in order to be considered for early release.

(c) Length of reduction.

(1) Except as specified in paragraphs (c)(2) and (3) of this section, an inmate who is

approved for early release may receive a reduction of up to 12 months.

(2) If the inmate has less than 12 months to serve after completion of all required transitional services, the amount of reduction may not exceed the amount of time left on service of sentence.

(3) If, based upon a disciplinary finding or based on program needs (for example, the inmate has not established an adequate release plan), the Community Corrections Regional Administrator may retard or disallow any portion of the maximum 12 months for an inmate in a community-based program.

28 C.F.R. § 550.58 (1997)

§ 550.58 Consideration for early release.

An inmate who was sentenced to a term of imprisonment pursuant to the provisions of 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense, and who is determined to have a substance abuse problem, and successfully completes a residential drug abuse treatment program during his or her current commitment may be eligible, in accordance with paragraph (a) of this section, for early release by a period not to exceed 12 months.

(a) Additional early release criteria.

(1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:

(i) INS detainees;

(ii) Pretrial inmates;

(iii) Contractual boarders (for example, D.C., State, or military inmates);

(iv) Inmates who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses;

(v) Inmates who are not eligible for participation in a community-based program as determined by the Warden on the basis of his or her professional discretion;

(vi) Inmates whose current offense is a felony:

(A) That has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

(B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

(C) That by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

(D) That by its nature or conduct involves sexual abuse offenses committed upon children.

(2) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:

(i) Staff confirm that the completed program matches the treatment required by statute;

(ii) The inmate signs an agreement acknowledging his/her program responsibility;

(iii) The inmate completes a refresher treatment program and all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(iv) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(3) An inmate who has successfully completed a Bureau of Prisons residential drug abuse treatment program on or after October 1, 1989 is otherwise eligible if:

(i) The inmate completes all applicable transitional services programs in a community-based program (i.e., in a Community Corrections Center or on home confinement); and

(ii) Since completion of the program, the inmate has not been found to have committed a 100 level prohibited act and has not been found to have committed a prohibited act involving alcohol or drugs.

(b) Application.

(1) Inmates currently enrolled. Eligible inmates currently enrolled in a residential drug

abuse treatment program shall automatically be considered for early release.

(2) Inmates who had previously completed program requirements. Eligible inmates who have previously completed a residential drug abuse treatment program (or which matches the treatment required by statute) must notify the institution's drug abuse program coordinator via a Request to Staff in order to be considered for early release.

(c) Length of reduction.

(1) Except as specified in paragraphs (c)(2) and (3) of this section, an inmate who is approved for early release may receive a reduction of up to 12 months.

(2) If the inmate has less than 12 months to serve after completion of all required transitional services, the amount of reduction may not exceed the amount of time left on service of sentence.

(3) If the inmate cannot fulfill his or her community-based treatment obligations by the presumptive release date, the Community Corrections Regional Administrator may adjust the presumptive release date by the minimum amount of time necessary to allow for fulfillment of the treatment obligations.

PS5162.02 DEFINITION OF TERM – CRIMES OF VIOLENCE

OPI: OGC
NUMBER: 5162.02
DATE: July 24, 1995
SUBJECT: Definition of Term, "Crimes of Violence"

1. PURPOSE AND SCOPE. To implement various portions of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) that make reference to "nonviolent offense," and "crime of violence," specifically, Section 20417, Notification of Release of Prisoners, Section 20405, Crediting of "Good Time," and Section 32001, Substance Abuse Treatment in Federal Prisons. This Program Statement defines "crime of violence" as that term is used in these sections of the VCCLEA. The definition includes broad statutory language, as well as a framework for determining which specific criminal offenses fall within the statutory definition.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. An inmate whose offense is a crime of violence will have that status reflected in his or her record and be subject to the limitations imposed by that status.

b. Case management staff will review relevant documents to determine whether an inmate has committed a crime of violence.

3. DIRECTIVES REFERENCED

P.S. 5322.09 Classification and Program Review of Inmates (03/10/94)

P.S. 5330.10 Drug Abuse Programs Manual, Inmate (05/25/95)

P.S. 5800.07 Inmate Systems Management Manual (12/24/91)

P.S. 5800.08 Receiving and Discharge Manual (06/15/93)

P.S. 5880.28 Sentence Computation Manual (CCCA of 1984) (02/21/92)

P.S. 5880.30 Sentence Computation Manual (Old Law, Pre-CCCA of 1984) (07/16/93)

4. STANDARDS REFERENCED. None.

5. STATUTORY DEFINITION. Title 18 of the United States Code defines "crime of violence" in Section 924(c)(3) as follows:

" The term 'crime of violence' means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

6. CRIMINAL PROVISIONS OF THE UNITED STATES CODE. Criminal offenses are defined in many different titles of the United States Code including Titles 7, 16, 18, 21, 26, 29, 30, and 46. The offenses contained within these titles that may be crimes of violence are listed in the various sections below. If a particular code section in these titles is not listed below, and case management staff

believe that the crime might be violent, they should contact Regional Counsel. Additionally, if a Judgment and Commitment Order references a United States Code section that is not found in Titles 7, 16, 18, 21, 26, 30, 42, or 49, please contact Regional Counsel to determine whether the particular offense should be categorized as a "crime of violence."

Some of the Code sections may be listed in more than one section below; this duplication is indicated by an asterisk. In such cases, staff should check subsequent sections of the Program Statement to determine whether the offense is a "crime of violence."

7. CRIMINAL OFFENSES THAT ARE CRIMES OF VIOLENCE IN ALL CASES. Any conviction for an offense listed below should be categorized as a "crime of violence."

a. Title 18, United State Code Sections

§ 32 (destruction of aircraft)

§ 34 (penalty when death results)

§ 35(b) (conveying false information that harms human life)

§ 36 VCCLEA addition (firing weapons into group of persons)

§ 37 VCCLEA addition (violence at international airports)

§ 43(b) (animal enterprise terrorism causing death or injury)

§ 81 (arson w/in maritime jurisdiction)

§ 111 (assaulting officers of the United States)

§ 112(a) (assaulting foreign officials)

§ 113 (assaults w/in maritime jurisdictions)

§ 114 (maiming w/in maritime jurisdiction)

§ 115 (threatening family member of a federal official)

§ 175 (biological weapons)

§ 231 (civil disorders)

§ 245 (federally protected activities)

§ 247(a)(1) (damage to religious property/obstruction of exercise of religion)

§ 247(a)(2) (obstruction of persons in free exercise of religion)

§ 351 (assassination of cabinet and congress members)

§ 373 (soliciting to commit a violent act)

§ 753 (rescue of an inmate to prevent execution)

* § 842 (explosive materials) *

§ 844 (penalties)

§ 871 (threats against the President)

§ 875(a),(b),(c) (interstate communications)

§ 878 (threats against foreign officials)

§ 879 (threats against former presidents)

* § 922(a)(4), (a)(7), (a)(8), (b)(4), (b)(5), * (d)(1), (d)(2), (d)(4), (d)(8), (g),(o),(p) (firearms violations)

§ 924(c) (firearms used in violent or drug trafficking crimes)

§ 930(b) & (c) (possession of firearms in federal facilities)

§ 970(a) (damage of property owned by foreign governments)

§ 1091 (genocide)

§ 1111 (murder)

§ 1112 (manslaughter)

§ 1113 (attempt to commit murder or manslaughter)

§ 1114 (murder of officers)

§ 1116 (murder of foreign officials)

§ 1117 (conspiracy to murder)

§ 1118 VCCLEA addition (murder in correctional institution)

§ 1119 VCCLEA addition (foreign murder of US national)

§ 1120 VCCLEA addition (murder by escaped prisoner)

§ 1121 VCCLEA addition (murder by state or local officer)

§ 1201 (kidnapping)

§ 1203 (hostage taking)

§ 1204 (international parental kidnapping)

§ 1364 (interference by foreign commerce by violence)

§ 1365 (tampering with consumer products) except 1365(b),(c)

§ 1512(a) (killing witness or victim)

§ 1513 (retaliation against witness or victim)

§ 1581 (peonage)

§ 1583 (enticement into slavery)

§ 1584 (sale into servitude)

§ 1585 (slave trading)

§ 1587 (possession of slaves aboard a vessel)

§ 1588 (transporting slaves)

§ 1651 (piracy)

§ 1652 (citizens as pirates)

§ 1653 (aliens as pirates)

§ 1655 (assault on commander as pirates)

§ 1659 (attack to plunder a vessel)

§ 1661 (robbery ashore)

§ 1751 (assassination of president or staff)

§ 1792 (mutiny or riot)

§ 1859 (surveys interrupted)

§ 1864 (hazardous devices on federal lands)

§ 1958 (use of interstate commerce in murder for hire)

§ 1959 (violent crimes aiding racketeering)

§ 1991 (entering train to commit crime)

§ 1992 (wrecking trains)

§ 2101 (riots)

§ 2111 (special maritime jurisdiction)

§ 2113(d),(e) (bank robbery and incidental crimes)

§ 2114 (assault of person carrying mail)

§ 2115 (breaking into post office)

§ 2118(a),(b),(c) (robberies and burglaries involving controlled substances)

§ 2119 (crimes involving motor vehicles)

§ 2191 (cruelty to seamen)

§ 2231(b) (assault or resistance)

§ 2232(a) (destruction of property to prevent seizure)

§ 2233 (rescue of seized property)

§ 2241 (aggravated sexual abuse)

§ 2242 (sexual abuse)

§ 2244(a) (abusive sexual contact)

§ 2261 VCCLEA addition (interstate domestic violence)

§ 2275 (firing or tampering with vessels)

§ 2276 (breaking and entering vessels)

§ 2280 VCCLEA addition (violence against maritime navigation)

§ 2281(NOT (A)), VCCLEA addition (violence against fixed platforms)

§ 2332 (penalties for homicide)

§ 2332a VCCLEA addition (use of weapons of mass destruction)

§ 2340A (torture)

§ 2383 (rebellion or insurrection)

§ 2384 (sedition conspiracy)

§ 2385 (advocating the overthrow of the government)

§ 2389 (recruiting for service against U.S.)

§ 2390 (enlistment to serve against U.S.)

§ 2421 (transportation for illegal sexual activity)

§ 2422 (coercion into interstate travel for illegal sexual activity)

§ 2423 (transportation of minors for illegal sexual activity)

b. Title 21 United States Code Sections

* § 841(e) (boobytraps on federal property) *

§ 848(e) (death penalty for criminal offenses)

§ 858 (endangering human life while manufacturing controlled substances)

* c. Title 26 United States Code Sections *

§ 5861(a)-(l) (firearms)

d. Title 42 United States Code Sections

§ 2283(a) (protection of nuclear inspectors)

§ 2284(a) (sabotage of nuclear facilities)

§ 3631 (interference with housing)

e. Title 49 United States Code Sections

§ 46502 (aircraft piracy)

§ 46504 (interference with flight crew members)

§ 46505(c) (carrying a weapon on an aircraft)

§ 46507 (false information and threats)

8. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON THE BASE OFFENSE LEVEL ASSIGNED. Convictions for an offense listed below may or may not have involved the use, attempted use, or threat of force, or presented the substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if an offense listed below involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," subsection entitled "Base Offense Level." This subsection references a particular United States Sentencing Guideline provision that distinguishes between violations of the particular criminal code section that are committed with and without force.

Example: Title 18 United States Code Section 241, Conspiracy Against Rights provides:

If two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant . . . . in the free exercise or enjoyment of any right or privilege . . . .

This crime could be committed through the use of force or threat of use of force, or not, since one can be oppressed through means other than force. Pursuant to United States Sentencing Guideline Section 2H2.1, if the crime involved obstructing an election or registration and the obstruction occurred using force or threat of force

against persons or property, the base offense level is 18. If the obstruction occurred through non-violent means, such as forgery, fraud, theft, deceit, etc., the base offense level is 12. If an offender was convicted of an offense listed below, case management staff must examine the base offense level to determine whether the offense was a crime of violence. If the Presentence Investigation Report does not include an explanation as to the reason for assigning a particular base offense level, case management staff may need to examine the particular Sentencing Guideline referenced.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a base level adjustment for violence. Accordingly, it is possible that an examination of the Offense Computation section of the Presentence Investigation Report may reveal no mention of violence. When the Presentence Investigation Report fails to explain the reason for assigning a particular base offense level, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

A list of offenses for which the Sentencing Guidelines base offense level is affected by the presence of violence follows:

Title 18 United States Code Sections

§ 33 (destruction of motor vehicles or facilities)

§ 241 FOR OTHER THAN CONSPIRACY (conspiracy against rights)

§ 242 (deprivation of rights under color of law)

§ 592 (putting troops at polls)

§ 593 (interference by armed forces)

§ 1791 (possessing contraband in prison)

§ 1952 (transporting items in aid of racketeering)

§ *2116 (railway or steamboat post office)

§ 2231(a) (assault on persons executing search warrant)

§ 2381 (treason)

9. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON THE SPECIFIC OFFENSE CHARACTERISTIC ASSIGNED. Convictions for an offense listed below, like those listed in Section 8 above, may or may not meet the crime of violence definition by involving the use, attempted use, or threatened use of force, or by presenting a substantial risk that force might be used against the person or property of another. At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offense Characteristics." This subsection references a particular United States Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

* Example: Section 841 of Title 21 United States Code makes it a* crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a

dangerous weapon was possessed during commission of the offense, the court would increase the defendant's base offense level by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs (21 U.S.C. § 841), and receives a two level enhancement for possession of a firearm has been convicted* of a "crime of violence." *

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a Specific Offense Characteristic for violence. Alternatively, the Presentence Investigation Report may fail to adequately describe the Specific Offense Characteristic that underlies the increase in offense level. In either case, it is possible that an examination of the Offense Computation section of the Presentence Investigation Report reveals no mention of violence. If this occurs, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Example: The Presentence Investigation Report in the above scenario may state "SOC (specific offense characteristic) 2F1.1(4) increase 2 levels." If the Report does not further state "since the offense involved the conscious or reckless risk of serious bodily injury, increase by two levels pursuant to 2F1.1(4)," the case management staff may have to examine Guideline 2F1.1(4) to determine that the only basis for this particular increase is a finding that the offense included the risk of bodily injury.

Case management staff may contact Regional Counsel if they have questions regarding this section. Below is a list of offenses for which there could be a Specific Offense Characteristic enhancement for the use of violence:

a. Title 16 United States Code Sections

§ 773e(a)(2),(3),(4),(6) (violation of Northern Pacific Halibut Act)

§ 773g (violation of Northern Pacific Halibut Act)

§ 1857(a)(D),(E),(F),(H) (violation of National Fishery Management Program)

§ 1859 (violation of National Fishery Management Program)

§ 2435(4),(5),(6),(7) (violation of Antarctic Marine Living Resources Convention)

§ 2438 (violation of Antarctic Marine Living Resources Convention)

§ 3606 (violation of North Atlantic Salmon Fishing)

§ 3637(a)(2),(3),(4),(6),(c) (violation of Pacific Salmon Fishing)

§ 5009(5),(6),(7),(8) (violation of North Pacific Anadromous Stock Convention)

§ 5010(b) (violation of North Pacific Anadromous Stock Convention)

b. Title 18 United States Code Sections

§ 755 (officer permitting escape)

§ 757 (procures escape for prisoner of war)

§ 874 (kickbacks from public works employees)

§ 894 (extending credit through extortionate means)

§ 1163 (embezzlement/theft from Indian organizations)

§ 1503 (influencing or injuring officer or juror)

§ 1505 (obstruction of proceedings before departments or agencies)

§ 1511 (obstruction of state or local law enforcement)

§ 1516 (obstruction of a federal audit)

§ 1517 (obstructing financial examination)

§ 1951 (interference with commerce by threats or violence)

§ 2112 (robbery of personal property of United States)

§ *2116 (breaking into a mail car)

c. Title 21 United States Code Sections

§ 841(NOT (e)), (controlled substance violation)

§ *846 (attempt and conspiracy)

d. Title 26 United States Code Sections

§ 7212 (attempt to interfere with revenue laws)

§ 7214 (unlawful acts by employees of the IRS)

e. Title 30 United States Code Sections

§ 1461(a)(3),(4),(5),(7) (resisting officers for violations under Deep Seabed Mineral Resources Act)

§ 1463 (violations of Deep Seabed Mineral Resources Act)

f. Title 33 United States Code Section

§ 1232(b)(2) (ports and waterways safety enforcement provisions)

g. Title 40 United States Code Section

§ 193f(a) (security of Capitol grounds and buildings)

h. Title 42 United States Code Sections

§ 1973aa (application of prohibition to other States)

§ 1973aa-1 (residence requirements for voting)

§ 1973aa-1a (bilingual election requirements)

§ 1973aa-3 (penalty)

§ 1973bb (enforcement of twenty-sixth amendment)

§ 1973gg-10 (criminal penalties)

§ 2283(b) (protection of nuclear inspectors)

§ 19151(2),(3),(4),(5) (violation of Ocean Thermal Energy Conversion Act)

§ 9152(d) (violation of Ocean Thermal Energy Conversion Act)

i. Title 46 United States Code Section

§ 1903 (Manufacture, Distribution, or possession with intent to manufacture controlled substances)

j. Title 49 United States Code Section

§ 46505(b) (carrying a weapon on an aircraft)

10. CRIMINAL OFFENSES THAT MAY BE CRIMES OF VIOLENCE DEPENDING ON A VARIETY OF FACTORS.

In addition to the two lists in Sections 8 and 9 above, there are several more code sections that can be violated with or without force. For the crimes listed below, the Sentencing Guidelines provide little insight into the court's findings on this issue. Accordingly, rather than simply examining the base offense level or the specific offense characteristics, case managers must carefully examine the entire Offense Computation section of the Presentence Investigation Report, and, if necessary, the Offense Conduct section, to determine whether the offense was violent.

For the sections listed below, staff should look carefully to see if the offense was committed through the use or threatened use of force against a person or property, or whether commission of the offense involved a substantial risk that force would be used against a person or property.

* Some of the statutes listed in this section cover conspiracy* offenses, (see, e.g., 18 U.S.C. § 371 and 21 U.S.C. § 846) where an individual has planned with others to commit a particular crime. Other listed statutes cover attempt offenses (see, e.g., 21 U.S.C. §§ 846 and 963) where an individual tried but did not succeed in committing a particular crime. In order to determine whether one [sic] these offenses is violent, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense would be classified as violent pursuant to the provisions of this program statement, e.g., murder, then the attempt or the conspiracy offense is also violent. The underlying offense may be noted on the Judgment and

Commitment Order and will certainly be included in the Presentence Investigation Report.

Example: The Judgment and Commitment Order may indicate a conviction for "Attempt and Conspiracy)" (21 U.S.C. § 846). The accompanying Presentence Investigation Report will reference the underlying crime, in many cases it will be "Possession with Intent to Distribute a Controlled Substance" (21 U.S.C. § 841). Staff should then review the underlying offense (in this case possession of controlled substance) using the categories in this program statement. As noted in the example on Section 9, if the Presentence Report indicates that the defendant received a 2 level increase for possessing a dangerous weapon ("Specific Offense Characteristic" for guideline § 2D1.1 or 2D1.11 applicable to 21 U.S.C. § 841 violations), then the offense should be deemed violent; if no such enhancement was given, the offense should be deemed nonviolent.

There are some statutes that do not criminalize behavior, but rather set out penalties that will result from violating other statutes.

Example: 18 U.S.C. § 924(a)(1)(B) provides that whoever "knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both."

The Judgment and Commitment Order may indicate the sentence was imposed pursuant to the penalty provisions of § 924(a)(1)(B) without indicating the conviction for the underlying offense. The PSI, however, will note the underlying conviction, e.g., "Transporting a Destructive Device in Interstate Commerce" (18 U.S.C. § 922(a)(4)). In

order to determine whether the offender's current offense is violent, staff should assess whether the underlying offense is violent in accordance with the provisions of this policy; if the underlying offense is violent, then the offender * should be deemed violent. *

Below is a list of offenses that may be violent depending on a variety of factors.

a. Title 7 United States Code Section

§ 473c-1 (offenses in relation to sampling of cotton)

b. Title 16 United States Code Sections

§ 5106(e)(5),(6),(7),(9),(f)(2) (violation of Atlantic Coast Fisheries Cooperative Management)

c. Title 18 United States Code Sections

§ 241 if conspiracy (conspiracy to deprive of civil rights)

§ 371 (conspiracy to commit offense or fraud against United States)

§ 372 (conspiracy to impede or inure officer)

§ 700 (desecration of the flag of the United States)

§ 751 (escape from federal prison)

§ 752 (instigating or assisting escape from federal prison)

§ 831 (prohibited acts involving nuclear materials)

§ 876 (mailing threatening communications)

§ 877 (mailing threatening communications from foreign country)

§ 924 (penalties for firearms violations)

§ 1153 (offenses within Indian Country)

§ 1512(b) (tampering with a witness/victim/informant)

§ 1708 (theft or receipt of stolen mail)

§ 1792 (mutiny and riot in prison)

§ 1956 (money laundering)

§ 1962 (racketeering)

§ 2117 (breaking into carrier facilities)

§ 2118(d) (robberies involving controlled substances)

§ 2152 (destruction of submarine and torpedo works)

§ 2153 (destruction of war materials)

§ 2154 (production of defective war material)

§ 2155 (destruction of national defense materials)

§ 2156 (production of defective national defense material)

§ 2192 (incitation of seamen to revolt)

§ 2193 (mutiny)

§ 2247 (repeat offenders)

§ 2387 (activities involving armed forces)

d. Title 21 United States Code Sections

§ *846 (attempt and conspiracy)

§ 848 (controlled substances violations as criminal enterprise)

§ 963 (conspiracy or attempt to violate controlled substance laws)

e. Title 40 United States Code Sections

§ 193f(a),(b) (security of Capitol grounds and buildings)

f. Title 42 United States Code Section

§ 2000(e)(13) (killing of officer while enforcing Equal Employment Act)

11. TITLE 18 UNITED STATES CODE SECTION 2113(a).

Title 18 United States Code Section 2113(a) provides in pertinent part:

Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . . shall be fined under this title or imprisoned not more than twenty years, or both.

This statute covers various offenses, including not only bank robbery, but embezzling bank funds, stealing bank property and bank larceny.

With regard to the specific crime of bank robbery, the offense should be considered a crime of violence pursuant to section 924(c)(3) since, due to the circumstances surrounding bank robberies, the offense involves an explicit or implicit threat of force and thus has as an element [sic] the "threatened use of physical force against the person or property of another."

However, as to other offenses covered by 18 U.S.C. § 2113(a), (e.g. bank larceny), similar to offenses in Section 9, defendants may receive a Specific Offense Characteristic enhancement that will result in an increase in the base offense level. Such enhancements provide for an increase in the defendant's base offense level if a firearm was discharged, if a firearm or other dangerous weapon was brandished, displayed, possessed or used or if an express or implied threat of death was made (U.S.S.G. 2B3.2(b), Application Notes 2 and 6). If a defendant received such an enhancement (or one of the other enhancements involving violence), the crime should be deemed "violent."

12. OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987. The Sentencing Guidelines are, generally, not applicable for offenses committed before November 1, 1987. Accordingly, for offenses identified in sections 8 through 10 above that were committed before this date, case managers must make their own determination, based on the narrative description of the crime contained in the Presentence Investigation Report, whether the crime has as an element the use of force or threat of force, or the offense, by its nature, posed a substantial risk that force would be used (see definition in 18 U.S.C. § 924(c)(3) quoted above).

13. CRIMES CODIFIED PURSUANT TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994. The VCCLEA created a number of new Federal criminal offenses and enhanced penalties for several existing offenses. Some of the new offenses are included in the above lists, but the lists will be revised as needed after the United States Sentencing Commission drafts

new guidelines. The above lists will be updated periodically to reflect legislative changes.

/s/
Kathleen M. Hawk
Director

PS 5162.04 CATEGORIZATION OF OFFENSES

OPI: OGC

NUMBER: 5162.04

DATE: October 9, 1997

SUBJECT: Categorization of Offenses

1. PURPOSE AND SCOPE. To assist in the implementation of various Federal Bureau of Prisons policies and programs. Section 6 of this Program Statement lists offenses the Bureau categorizes as crimes of violence as that term is used in various statutes. In addition, Section 7 lists offenses that in the Director's discretion shall preclude an inmate's receiving certain Bureau program benefits.

2. PROGRAM OBJECTIVE. The expected result of this program is:

An inmate will be denied the benefits of certain programs if his or her offense is either a crime of violence or an offense identified at the discretion of the Director of the Bureau of Prisons.

3. DIRECTIVES AFFECTED

a. Directive Rescinded

OM 149-96 (5162) Release Procedures for Inmates Eligible for Sentence Reduction Under 18 U.S.C. § 3621(e) in the Ninth Circuit (12/24/96)

b. Directives Referenced

PS 5110.11 Notification of Release to State and Local Law Enforcement Officials (10/31/95)

PS 5162.02 Definition of Term, Crimes of Violence (7/24/95)

PS 5322.09 Classification and Program Review of Inmates (3/10/94)

PS 5330.10 Drug Abuse Programs Manual, Inmate (5/25/95)

PS 5390.07 Intensive Confinement Center Program (4/24/96)

PS 5800.07 Inmate Systems Management Manual (12/24/91)

PS 5800.08 Receiving and Discharge Manual (6/15/93)

PS 5880.28 Sentence Computation Manual (CCCA of 1984) (2/21/92)

PS 5880.30 Sentence Computation Manual (Old Law, Pre-CCCA of 1984) (7/16/93)

4. STANDARDS REFERENCED. None.

5. APPLICATION. Criminal offenses are defined in many different titles of the United States Code including Titles 7, 16, 18, 21, 26, 29, 30, and 46. The offenses contained in these titles that may be crimes of violence are listed in Section 6. Section 7 lists offenses that are not categorized as crimes of violence, but would nevertheless preclude an inmate's receiving certain Bureau program benefits at the Director's discretion.

Some Bureau policies or programs require a determination that an inmate committed a crime of violence, for example, the Program Statement on Inmate Discipline and Special Housing Units. Other policies or programs,

such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, indicate that an inmate may be denied the benefits of such programs if he or she was convicted of an offense listed in either Section 6 or 7. When an inmate may be denied a program benefit under either Section 6 or 7, staff must carefully explain the basis for the denial. For example, if an inmate is convicted of an offense listed in Section 7, the inmate should be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

If a particular Code section in these titles is not listed in Section 6 or Section 7, and case management staff believe the crime might be violent, or might preclude an inmate's receiving certain Bureau program benefits, they shall contact legal staff at the institution or the Regional Counsel. Also, if a Judgment and Commitment Order (J&C) references a United States Code section that is not found in Titles 7, 16, 18, 21, 26, 30, 42, or 49, they should contact legal staff at the institution or the Regional Counsel to determine whether a recommendation should be made to change the policy to incorporate the offense in question.

Some of the Code sections may be listed in more than one section below; such duplication is indicated by an asterisk. In such cases, staff are to check subsequent sections of the Program Statement to determine whether the offense is a crime of violence or an offense that would otherwise preclude an inmate's receiving certain Bureau program benefits.

6. OFFENSES CATEGORIZED AS CRIMES OF VIOLENCE

a. Criminal Offenses That are Crimes of Violence in All Cases. Some Bureau policies or programs require a determination that an inmate committed a crime of violence, for example, the Program Statement on Inmate Discipline and Special Housing Units. Other policies or programs, such as early release pursuant to 18 U.S.C. § 3621(e), indicate that an inmate could be denied the benefits of such programs if he or she was convicted of an offense listed in either Section 6 or 7.

Any conviction for an offense listed below is categorized as a crime of violence.

(1) Title 18, United State Code Sections

§ 32 destruction of aircraft

§ 34 penalty when death results

§ 35(b) conveying false information that harms human life

§ 36 firing weapons into group of persons (VCCLEA addition)

§ 37 violence at international airports (VCCLEA addition)

§ 43(b) animal enterprise terrorism causing death or injury

§ 81 arson w/in maritime jurisdiction

§ 111 assaulting officers of the United States

§ 112(a) assaulting foreign officials

§ 113 assaults w/in maritime jurisdictions

§ 114 maiming w/in maritime jurisdiction

§ 115 threatening family member of a federal official

§ 175 biological weapons

§ 231 civil disorders

§ 245 federally protected activities

§ 247(a)(1) damage to religious property/obstruction of exercise of religion

§ 247(a)(2) obstruction of persons in free exercise of religion

§ 351 assassination of cabinet and congress members

§ 373 soliciting to commit a violent act

§ 753 rescue of an inmate to prevent execution

§ 842 explosive materials

§ 844 penalties

§ 871 threats against the President

§ 875(a), (b), (c) interstate communications

§ 878 threats against foreign officials

§ 879 threats against former presidents

§ 922(a)(4), (a)(7), (a)(8), (b)(4), (b)(5), (d)(1), (d)(2), (d)(4), (d)(8), (o), (p) firearms violations

§ 924(c) firearms used in violent or drug trafficking crimes

§ 930(b)&(c) possession of firearms in federal facilities

§ 970(a) damage of property owned by foreign governments

§ 1091 genocide

§ 1111 murder

§ 1112 manslaughter

§ 1113 attempt to commit murder or manslaughter

§ 1114 murder of officers

§ 1116 murder of foreign officials

§ 1117 (conspiracy to murder)

§ 1118 murder in correctional institution (VCCLEA addition)

§ 1119 foreign murder of US national (VCCLEA addition)

§ 1120 murder by escaped prisoner (VCCLEA addition)

§ 1121 murder by state or local officer (VCCLEA addition)

§ 1201 kidnapping

§ 1203 hostage taking

§ 1204 international parental kidnapping

§ 1364 interference by foreign commerce by violence

§ 1365 tampering with consumer products except 1365(b), (c)

§ 1512(a) killing witness or victim

§ 1513 retaliation against witness or victim

§ 1581 peonage

§ 1583 enticement into slavery

§ 1584 sale into servitude

§ 1585 slave trading

§ 1587 possession of slaves aboard a vessel

§ 1588 transporting slaves

§ 1651 piracy

§ 1652 citizens as pirates

§ 1653 aliens as pirates

§ 1655 assault on commander as pirates

§ 1659 attack to plunder a vessel

§ 1661 robbery ashore

§ 1751 assassination of president or staff

§ 1792 mutiny or riot

§ 1859 surveys interrupted

§ 1864 hazardous devices on federal lands

§ 1958 use of interstate commerce in murder for hire

§ 1959 violent crimes aiding racketeering

§ 1991 entering train to commit crime

§ 1992 wrecking trains

§ 2101 riots

§ 2111 special maritime jurisdiction

§ 2113(d), (e) bank robbery and incidental crimes

§ 2114 assault of person carrying mail

§ 2115 breaking into post office

§ 2118(a), (b), (c) robberies and burglaries involving controlled substances

§ 2119 crimes involving motor vehicles

§ 2191 cruelty to seamen

§ 2231(b) assault or resistance

§ 2232(a) destruction of property to prevent seizure

§ 2233 rescue of seized property

§ 2241 aggravated sexual abuse

§ 2242 sexual abuse

§ 2244(a) abusive sexual contact

§ 2245 sexual abuse resulting in death (VCCLEA addition)

§ 2261 interstate domestic violence (VCCLEA addition)

§ 2275 firing or tampering with vessels

§ 2276 breaking and entering vessels

§ 2280 violence against maritime navigation (VCCLEA addition)

§ 2281(NOT(A))violence against fixed platforms (VCCLEA addition)

§ 2332 penalties for homicide

§ 2332a use of weapons of mass destruction (VCCLEA addition)

§ 2340A torture

§ 2383 rebellion or insurrection

§ 2384 sedition conspiracy

§ 2385 advocating the overthrow of the government

§ 2389 recruiting for service against U.S.

§ 2390 enlistment to serve against U.S.

§ 2421 transportation for illegal sexual activity

§ 2422 coercion into interstate travel for illegal sexual activity

§ 2423 transportation of minors for illegal sexual activity

(2) Title 21 United States Code Sections

§ 841(e) boobytraps on federal property

§ 848(e) death penalty for criminal offenses

§ 858 endangering human life while manufacturing controlled substances

(3) Title 26 United States Code Sections

§ 5861(a) thru (l) firearms

(4) Title 42 United States Code Sections

§ 2000(e)(13) killing of officer while enforcing Equal Employment Act

§ 2283(a) protection of nuclear-inspectors

§ 2284(a) sabotage of nuclear facilities

§ 3631 interference with housing

(5) Title 49 United States Code Sections

§ 46502 aircraft piracy

§ 46504 interference with flight crew members

§ 46505(c) carrying a weapon on an aircraft

§ 46507 false information and threats

b. * Title 18, United States Code Section 2113(a). Title 18, United States Code Section 2113(a) provides in part:

"Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; . . . shall be fined under this title or imprisoned not more than twenty years, or both."

This statute covers various offenses, including not only bank robbery but also embezzling bank funds, stealing bank property, and bank larceny.

With regard to the specific crime of bank robbery, the offense shall be considered a crime of violence, since the offense involves an explicit or implicit threat of force and thus has as an element the threatened use of physical force against the person or property of another. For offenses pursuant to § 2113(a) other than bank robbery, see Section 7.e. below.

c. Conspiracy, Attempt, and Similar Offenses Which Involve an Underlying Offense. The statutes listed in this section cover conspiracy offenses (see, e.g., 18 U.S.C. § 371) when an individual has planned with others to commit a particular crime. Other listed statutes cover attempted offenses, i.e. when an individual tried but did not succeed in committing the crime. In reviewing these types of offenses, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense is categorized as violent pursuant to Section 6.a. of this Program Statement, e.g., murder, then the attempt or the conspiracy offense is also violent. The underlying offense will be included in the PSI and may be noted on the J&C.

Other statutes listed in this section do not criminalize behavior but set out penalties that result from violating other statutes.

Example: 18 U.S.C. § 924(a)(1)(B) provides that whoever "knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922 . . . shall be fined under this title, imprisoned not more than five years, or both."

The J&C may indicate the sentence was imposed pursuant to the penalty provisions of § 924(a)(1)(B) without indicating the conviction for the underlying offense. The PSI, however, notes the underlying conviction, "Transporting a Destructive Device in Interstate Commerce" [18 U.S.C. § 922(a)(4)]. In order to determine whether the offender's current offense is violent, staff should assess whether the underlying offense is violent in accordance

with Section 6.a. of this Program Statement; if the underlying offense is violent, then the offender should be deemed violent.

The following offenses may be violent depending on the underlying offense.

Title 18, United States Code Sections

§ *241 conspiracy to deprive civil rights (if conspiracy)

§ *371 conspiracy to commit offense/fraud against U.S.

§ *372 conspiracy to impede or inure officer

§ *924 penalties for firearms violations

§ *1962 racketeering

§ *2118(d) robberies involving controlled substances

7. OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN BUREAU PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed in either this section or Section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under

the provisions described below shall be precluded from receiving certain Bureau program benefits.

Inmates whose current offense is a felony that:

has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

a. Criminal Offenses with an Enhanced Base Offense Level. Convictions for an offense listed below may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether an offense listed below involved the use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Base Offense Level." This subsection references a particular U.S. Sentencing Guideline provision that distinguishes

between violations of the particular criminal code section that are committed with and without force.

Example: Title 18 United States Code Section 241, Conspiracy Against Rights provides:

"If two or more persons conspire to injure, oppress, threaten or intimidate any person . . . in the free exercise or enjoyment of any right or privilege. . . . "

This crime may or may not be committed through the use of force or threatened use of force, since one can be oppressed through means other than force. Pursuant to U.S. Sentencing Guideline Section 2H2.1:

if the crime involved obstructing an election or registration, and the obstruction occurred using force or threat of force against persons or property, the base offense level is 18, or

if the obstruction occurred without the use or threatened use of force, such as forgery, fraud, theft, deceit, etc., the base offense level is 12.

If an offender was convicted of an offense listed below, case management staff must examine the base offense level to determine whether the offense would preclude the inmate from receiving certain Bureau program benefits. If the PSI does not include an explanation as to the reason for assigning a particular base offense level, case management staff may need to examine the particular Sentencing Guideline referenced.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a base level adjustment for the use or threatened

use of force. Accordingly, it is possible that an examination of the Offense Computation section of the PSI may reveal no mention of the use or threatened use of force. When the PSI fails to explain the reason for assigning a particular base offense level, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Case management staff may contact institution legal staff or Regional Counsel if they have questions regarding this section. A list of offenses for which the Sentencing Guidelines base offense level is affected by the use or threatened use of force follows. At the Director's discretion, inmates with such an offense shall be precluded from receiving certain Bureau program benefits.

Title 18, United States Code Sections

§ 33 destruction of motor vehicles or facilities

§ 241 conspiracy against rights (for other than conspiracy)

§ 242 deprivation of rights under color of law

§ 592 putting troops at polls

§ 593 interference by armed forces

§ 1791 possessing contraband in prison

§ 1952 transporting items in aid of racketeering

§ *2116 railway or steamboat post office

§ 2231(a) assault on persons executing search warrant

§ 2381 treason

b. Criminal Offenses with a Specific Offense Characteristic Enhancement. Convictions for an offense listed below, like those listed in Section 7.a., may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

Example: Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has

been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

In some cases, an inmate may be convicted of an offense listed in this section as well as 18 U.S.C. § 924(c)(1), use of a firearm during a crime of violence or drug trafficking crime. According to the U.S. Sentencing Guidelines, if a defendant receives a § 924(c)(1) conviction, the court may not assess a two-level "Specific Offense Characteristic" enhancement for possession of a firearm; however, in light of the Supreme Court ruling in Bailey v. U.S., 116 S.Ct. 501 (1995), a number of § 924(c)(1) convictions have been vacated. In Bailey, the Court held that the term "use" connotes an active employment of the firearm. If any of the offenses listed in this section were accompanied by a § 924(c)(1) conviction that was subsequently vacated due to the Bailey decision, staff shall presume that the inmate would have received a two-level "Specific Offense Characteristic" enhancement for possession of a firearm unless there is a specific court order to the contrary. Thus, absent a court order specifically denying the application of a two point enhancement for possession of a firearm, the inmate will not receive certain Bureau program benefits.

Some of the offenses listed below may correspond to more than one Sentencing Guideline, only one of which includes a Specific Offense Characteristic for the use of force. Alternatively, the PSI may fail to adequately describe the Specific Offense Characteristic that underlies the increase in offense level. In either case, it is possible that an examination of the Offense Computation section of the PSI reveals no mention of the use of force. If this

occurs, case management staff must examine the particular Sentencing Guideline referenced to determine whether the court found that the use of force was implicated in the offense.

Example: The PSI in the above scenario may state "SOC (specific offense characteristic) 2F1.1(4) increase 2 levels." If the Report does not further state "since the offense involved the conscious or reckless risk of serious bodily injury, increase by two levels pursuant to 2F1.1(4)," the case management staff may have to examine Guideline 2F1.1(4) to determine that the only basis for this particular increase is a finding that the offense included the risk of bodily injury.

Case management staff may contact institution legal staff or Regional Counsel if they have questions regarding this section. Below is a list of offenses for which there could be a Specific Offense Characteristic enhancement for the use of force:

(1) Title 16, United States Code Sections

§ 773e(a)(2), (3), (4), (6) violation of Northern Pacific Halibut Act

§ 773g violation of Northern Pacific Halibut Act

§ 1857(a)(D), (E), (F), (H) violation of National Fishery Management Program

§ 1859 violation of National Fishery Management Program

§ 2435(4), (5), (6), (7) violation of Antarctic Marine Living Resources Convention

§ 2438 violation of Antarctic Marine Living Resources Convention

§ 3606 violation of North Atlantic Salmon Fishing

§ 3637(a)(2), (3), (4), (6), (c) violation of Pacific Salmon Fishing

§ 5009(5), (6), (7), (8) violation of North Pacific Anadromous Stock Convention

§ 5010(b) violation of North Pacific Anadromous Stock Convention

(2) Title 18, United States Code Sections

§ 755 officer permitting escape

§ 757 procures escape for prisoner of war

§ 874 kickbacks from public works employees

§ 894 extending credit through extortionate means

§ 1163 embezzlement/theft from Indian organizations

§ 1503 influencing or injuring officer or juror

§ 1505 obstruction of proceedings before departments or agencies

§ 1511 obstruction of state or local law enforcement

§ 1516 obstruction of a federal audit

§ 1517 obstructing financial examination

§ 1951 interference with commerce by threats/violence

§ 2112 robbery of personal property of United States

§ *2116 breaking into a mail car

(3) Title 21, United States Code Sections

§ 841(NOT(e)),controlled substance violation

§ *846 attempt and conspiracy

(4) Title 26, United States Code Sections

§ 7212 attempt to interfere with revenue laws

§ 7214 unlawful acts by employees of the IRS

(5) Title 30, United States Code Sections

§ 1461(a)(3), (4), (5), (7) resisting officers for violations under Deep Seabed Mineral Resources Act

§ 1463 violations of Deep Seabed Mineral Resources Act

(6) Title 33, United States Code Section

§ 1232(b)(2) ports and waterways safety enforcement provisions

(7) Title 40, United States Code Section

§ 193f(a) security of Capitol grounds and buildings

(8) Title 42, United States Code Sections

§ 1973aa application of prohibition to other States

§ 1973aa-1 residence requirements for voting

§ 1973aa-1a bilingual election requirements

§ 1973aa-3 penalty

§ 1973bb enforcement of twenty-sixth amendment

§ 1973gg-10 criminal penalties

§ 2283(b) protection of nuclear inspectors

§ 19151(2), (3), (4), (5) violation of Ocean Thermal Energy Conversion Act

§ 9152(d) violation of Ocean Thermal Energy Conversion Act

(9) Title 46, United States Code Section

§ 1903 Manufacture, Distribution, or possession with intent to manufacture controlled substances

(10) Title 49, United States Code Section

§ 46505(b) carrying a weapon on an aircraft

c. Criminal Offenses That May Preclude an Inmate's Receiving Certain Bureau Program Benefits. In addition to Sections 7.a. and 7.b. above, an inmate may be precluded from receiving certain Bureau program benefits based on an offense listed in this section. For the offenses listed below, the Sentencing Guidelines may provide little insight into the court's findings. Accordingly, rather than simply examining the base offense level or the specific offense characteristics, case managers must carefully examine the entire Offense Computation section of the PSI and, if necessary, the Offense Conduct section to determine if the offense would preclude an inmate's receiving certain Bureau program benefits based on whether the offense satisfies the standard listed in the introductory portion of Section 7.

The following offenses may preclude an inmate's receiving certain Bureau program benefits based on a variety of factors.

(1) Title 7, United States Code Section

§ 473c-1 offenses in relation to sampling of cotton

(2) Title 16, United States Code Sections

§ 5106(e)(5), (6), (7), (9), violation of Atlantic Coast Fisheries

(f)(2) Cooperative Management

(3) Title 18, United States Code Sections

§ 700 desecration of the flag of the United States

§ 751 escape from federal prison

§ 752 instigating/assisting escape from federal prison

§ 831 prohibited acts involving nuclear materials

§ 876 mailing threatening communications

§ 877 mailing threatening communications from foreign country

§ 1153 offenses within Indian Country

§ 1512(b) tampering with a witness/victim/informant

§ 1708 theft or receipt of stolen mail

§ 1792 mutiny and riot in prison

§ 1956 money laundering

§ 2117 breaking into carrier facilities

§ 2152 destruction of submarine and torpedo works

§ 2153 destruction of war materials

§ 2154 production of defective war material

§ 2155 destruction of national defense materials

§ 2156 production of defective national defense material

§ 2192 incitation of seamen to revolt

§ 2193 mutiny

§ 2247 repeat offenders

§ 2387 activities involving armed forces

(4) Title 40, United States Code Sections

§ 193f(a), (b) security of Capitol grounds and buildings

d. Conspiracy, Attempt, and Other Offenses Which Involve an Underlying Offense. Some of the statutes listed in this section cover conspiracy offenses (see, e.g., 21 U.S.C. § 846) when an individual has planned with others to commit a particular crime. Other listed statutes cover attempted offenses (see, e.g., 21 U.S.C. §§ 846 and 963) when an individual tried but did not succeed in committing the crime. In reviewing these types of offenses, it is necessary to examine the "underlying offense" (what the defendant was conspiring to do or attempting to do). If the underlying offense would preclude the inmate from receiving certain Bureau program benefits based on any of the other portions of Section 7 of this policy, the conspiracy or the attempt offense shall also preclude the inmate from receiving the same benefits. The underlying offense will be included in the PSI and may be noted on the J&C.

Example: The Judgment and Commitment Order may indicate a conviction for "Attempt and Conspiracy" (21 U.S.C. § 846). The accompanying Presentence Investigation Report will reference the underlying crime, in many cases it will be "Possession with Intent to Distribute a

Controlled Substance" (21 U.S.C. § 841). Staff should then review the underlying offense (in this case possession of controlled substance) to determine whether it satisfies the standard listed in the introductory portion of Section 7. As noted in the example in section b above, if the PSI indicates that the defendant received a 2 level increase for possessing a dangerous weapon, then the offense should preclude the inmate from receiving certain Bureau program benefits; if no such enhancement was given, the offense should not preclude the inmate from receiving such benefits.

(1) Title 18, United States Code Sections

§ *241 conspiracy to deprive civil rights (if conspiracy)

§ *371 conspiracy to commit offense/fraud against U.S.

§ *372 conspiracy to impede or inure officer

§ *924 penalties for firearms violations

§ *1962 racketeering

§ *2118(d) robberies involving controlled substances

(2) Title 21, United States Code Sections

§ *846 attempt and conspiracy

§ 848 controlled substances violations as criminal enterprise

§ 963 conspiracy or attempt to violate controlled substance laws

e. Special Circumstances

Title 18, United States Code § 922(g). All offenses under 18 U.S.C. § 922(g) shall preclude an inmate from receiving certain Bureau program benefits.

*Title 18, United States Code § 2113(a). Excluding bank robbery (see Section 6.b. above), other offenses covered by 18 U.S.C. § 2113(a), (e.g., bank larceny, etc.), shall be reviewed similarly to offenses in Section 7.b. Defendants may receive a Specific Offense Characteristic enhancement that will result in an increase in the base offense level. Such enhancements provide for an increase in the defendant's base offense level if:

a firearm was discharged, a firearm or other dangerous weapon was brandished, displayed, possessed or used, or an express or implied threat of death was made (U.S.S.G. 2B3.2(b), Application Notes 2 and 6).

If a defendant received such an enhancement (or one of the other enhancements involving the use or threatened use of force), the offense shall preclude the inmate's receiving certain Bureau program benefits.

Title 18, United States Code § 2243. A conviction for sexual abuse of a minor or ward shall preclude an inmate from receiving certain Bureau program benefits.

8. OFFENSES COMMITTED BEFORE NOVEMBER 1, 1987. The Sentencing Guidelines are generally not applicable for offenses committed before November 1, 1987. Accordingly, for offenses identified in Section 7 or offenses similar to those listed in Section 7 of this Program Statement that were committed before this date, case managers must make a determination, based on the

narrative description of the crime contained in the PSI, whether the offense involved:

the use, attempted use, or threatened use of force; the use, carrying, or possession of a dangerous weapon; a serious potential risk that force might be used against the person or property of another; or sexual abuse committed upon children.

Offenses listed in Section 6, Crimes of Violence, or offenses similar to those listed in Section 6, which were committed before November 1, 1987, shall be treated in the same manner as "new law" offenses.

9. CRIMES CODIFIED PURSUANT TO THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994. The VCCLEA created a number of new Federal criminal offenses and enhanced penalties for several existing offenses. Some of the new offenses are included in the above lists, but the lists will be revised as needed after the U.S. Sentencing Commission drafts new guidelines. These lists will also be updated periodically to reflect statutory changes or at the Director's discretion.

/s/
Kathleen M. Hawk
Director

Supreme Court, U.S.
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No. 99-7504

In the Supreme Court of the United States

CHRISTOPHER A. LOPEZ, PETITIONER

v.

RANDY J. DAVIS, WARDEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Bureau of Prisons may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession, or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 23-28) is reported at 186 F.3d 1092. The opinion of the district court (J.A. 8-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1999. A petition for rehearing was denied on September 16, 1999 (J.A. 29). The petition for a writ of certiorari was filed on December 15, 1999, and was granted on April 24, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3621(e) of Title 18 of the United States Code provides in relevant part:

(e) SUBSTANCE ABUSE TREATMENT.—

(1) PHASE-IN.—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)—

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—

(A) GENERALLY—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) PERIOD OF CUSTODY.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

2. Section 550.58 of Title 28 of the Code of Federal Regulations provides in relevant part:

Consideration for early release.

* * * * *

(a) *Additional early release criteria.* (1) As an exercise of the discretion vested in the Director of

the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:

* * * * *

(vi) Inmates whose current offense is a felony:

* * * * *

(B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device) * * * .

3. The Bureau of Prisons' Program Statement 5162.04 (Oct. 9, 1997) is reproduced in the appendix to petitioner's brief at Pet. Br. App. 29-54.

STATEMENT

Section 3621(e)(2)(B) of Title 18 of the United States Code provides that the Bureau of Prisons (BOP or Bureau) may reduce by up to one year the prison term of a prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program. Petitioner was denied eligibility for such early release by the application of a BOP regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and BOP Program Statement 5162.04 (Oct. 9, 1997), which implement Section 3621(e)(2)(B). The basis for that denial was that his current offense is a felony that involved the carrying, possession, or use of a firearm. The United States District Court for the District of South Dakota held that the Bureau's interpretation of Section 3621(e)(2)(B) is inconsistent with the language of the statute, and it ordered the Bureau to reconsider petitioner for early release in accordance with the court's

opinion. J.A. 8-20. The court of appeals reversed and upheld the Bureau's regulation and Program Statement 5162.04 as an appropriate exercise of discretion under Section 3621(e)(2)(B). J.A. 23-28.

1. a. In 1990, Congress amended Section 3621 of Title 18 of the United States Code to require that the Bureau "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. 3621(b). In 1994, Congress created an incentive for federal prisoners to participate in BOP's residential substance abuse treatment program.[1] Congress amended Section 3621 of Title 18 of the United States Code to provide, *inter alia*, that BOP may reduce a prisoner's sentence by up to one year if the prisoner is convicted of a nonviolent offense and successfully completes BOP's residential substance abuse treatment program. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. III,

[1] BOP's residential substance abuse treatment "is a course of individual and group activities provided by a team of drug abuse treatment specialists and the drug abuse treatment coordinator in a treatment unit set apart from the general prison population, lasting a minimum of 500 hours over a six to twelve-month period. Inmates enrolled in a residential drug abuse treatment program shall be required to complete subsequent transitional services programming in a community-based program and/or in a Bureau institution." 28 C.F.R. 550.56.

Subtit. T, § 32001, 108 Stat. 1896-1898 (1994 Crime Control Act). Section 3621(e) provides, in relevant part:

> SUBSTANCE ABUSE TREATMENT.—
>
> * * * * *
>
> (2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—
>
> * * * * *
>
> (B) PERIOD OF CUSTODY.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. 3621(e).

b. In May 1995, the Bureau amended its rule on drug abuse treatment programs to implement Section 3621(e)(2)(B). The amended rule allowed consideration of early release of prisoners who met the statutory prerequisites of successful completion of a treatment program and conviction of a nonviolent offense. 60 Fed. Reg. 27,692-27,695. The rule provided that a prisoner who completed a residential substance abuse treatment program may be eligible for early release unless, *inter alia*, the prisoner's "current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3)." 28 C.F.R. 550.58 (1995).[2] Section 924(c)(3) defined "crime

[2] The regulation also excluded from early release inmates who were INS detainees, pretrial inmates, contractual boarders (for example, D.C., state, or military inmates), inmates who were eligible for parole, and inmates who had a prior federal or state conviction for homicide, forcible rape, robbery, or aggravated assault. 28 C.F.R. 550.58 (1995).

of violence" to mean a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3).

On July 24, 1995, the Bureau issued Program Statement 5162.02,[3] to implement provisions of the 1994 Crime Control Act relating to the notification of release of prisoners, credit of "[g]ood [t]ime," and substance abuse treatment programs, all of which made reference to "nonviolent offense" or "crime of violence." Pet. Br. App. 7. The program statement defined "crime of violence" as it was used in those statutory provisions and provided a framework to assist BOP employees in determining which criminal offenses fell within the definitions. *Ibid.* The program statement included as a crime of violence a drug trafficking conviction under 21 U.S.C. 841 (except for 841(e)) or 846, if the inmate received a two-level increase in his offense level under Sentencing Guidelines §§ 2D1.1, 2D1.11, for possession of a dangerous weapon during commission of the offense. Pet. Br. App. 17-18, 20, 23.

The courts of appeals reached differing conclusions on the validity of the Bureau's 1995 regulation and Program Statement 5162.02. Two courts of appeals found the Bureau's definition of a crime of violence to

[3] Program Statement 5162.02 (July 24, 1995) is reproduced in the appendix to petitioner's brief at Pet. Br. App. 7-28.

be reasonable. See *Pelissero* v. *Thompson*, 170 F.3d 442, 445-446 (4th Cir. 1999) (BOP's definition of crime of violence to include drug offenses that involved possession of a firearm is permissible and reasonable interpretation of early release statute, although definition may not harmonize with judicial interpretations of "crime of violence" under Section 924(c)(3)); *Venegas* v. *Henman*, 126 F.3d 760, 763 (5th Cir. 1997) (BOP reasonably interpreted Section 3621(e)(2)(B) to allow it to determine what offenses are violent for purposes of that statute), cert. denied, 523 U.S. 1108 (1998). Other courts, however, found that the Bureau's definition conflicted with the statutory text. See *Fristoe* v. *Thompson*, 144 F.3d 627, 631 (10th Cir. 1998) (BOP's interpretation of "nonviolent offense" violated the plain language of Section 3621(e)(2)(B) which "does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense"); *Byrd* v. *Hasty*, 142 F.3d 1395, 1398 (11th Cir. 1998) ("BOP exceeded its statutory authority when it categorically excluded from eligibility those inmates convicted of a nonviolent offense who received a sentencing enhancement for possession of a firearm."); *Bush* v. *Pitzer*, 133 F.3d 455, 456-457 (7th Cir. 1997) (BOP's Program Statement 5162.02 adopted "overbroad definition of a violent offense," but BOP's current regulation rationally denies early release to prisoners whose underlying conduct is violent or prone to violence); *Martin* v. *Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998) (BOP's "inclusion of sentencing enhancement factors in the determination of what is a 'nonviolent offense'" is in conflict with the plain language of the statute which uses the term "convicted"); *Roussos* v. *Menifee*, 122 F.3d 159, 161-164 (3d Cir. 1997) (BOP interpretation of "nonviolent offense" is in conflict with statute and regulation); *Downey* v. *Crabtree*, 100 F.3d

662, 668 (9th Cir. 1996) (rejecting BOP's interpretation because statute "addresses the act of convicting, not sentencing or sentence-enhancement factors").

c. Effective October 9, 1997,[4] the Bureau again revised its rule on drug abuse treatment programs "to demonstrate more clearly the discretion granted to the Director of the Bureau of Prisons under 18 U.S.C. 3621(e) by listing the criteria that would preclude an inmate from receiving a sentence reduction as determined by the Director of the Bureau of Prisons." 62 Fed. Reg. 53,690.[5] In the introduction to the rule, the Bureau Director noted that, because of differing holdings in the federal courts on the effect of BOP's reliance on 18 U.S.C. 924(c)(3) to define the term "crime of violence," some crimes were not clearly covered by BOP's definition. 62 Fed. Reg. at 53,690. The rule "avoid[ed] this complication by using the discretion allotted to the Director of the Bureau of Prisons in granting a sentence reduction to exclude inmates whose current offense is a felony" that, *inter alia*, "involved the carrying, possession, or use of a firearm." *Ibid.*

As revised, BOP's current regulation provides that an inmate may be eligible for early release if the inmate was sentenced for a nonviolent offense, is determined to have a substance abuse problem, and successfully com-

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[4] The rule was filed for public inspection at the Federal Register on October 9, 1997, see 62 Fed. Reg. at 53,691, and was published on October 15, 1997.

[5] On May 17, 1996, BOP had amended its rule on drug abuse treatment programs to include a transitional treatment phase. 61 Fed. Reg. 25,121-25,122. That rule, the May 1995 rule, and the October 1997 rule were all issued as interim rules with requests for comments, as BOP sought to avoid a gap in its rules for consideration of early release for qualified inmates. See 62 Fed. Reg. at 53,690.

pletes a residential substance abuse treatment program. 28 C.F.R. 550.58. The regulation further provides, however, that "[a]s an exercise of the discretion vested in the Director of [BOP]," certain categories of inmates are not eligible for early release. 28 C.F.R. 550.58(a). Those categories are not identified by incorporating the definition of a crime of violence set forth in 18 U.S.C. 924(c)(3) (1994 & Supp. IV 1998). Rather, the rule enumerates the categories. The categories include inmates whose current offense is a felony that involved carrying, possession, or use of a firearm (or other dangerous weapon or explosive), as well as inmates who committed a felony that falls into one of three other categories—two of which correspond to the provisions in 18 U.S.C. 924(c)(3) (1994 & Supp. IV 1998), and one that applies to inmates whose offense, "by its nature or conduct involves sexual abuse offenses committed upon children." 28 C.F.R. 550.58(a)(vi)(A)-(D). The regulation also continues to exclude from eligibility for early release inmates in the other categories defined in the 1995 regulation. See note 2, *supra*.

On October 9, 1997, the Bureau promulgated Program Statement 5162.04 (Pet. Br. App. 29-54) to assist its employees in implementing various policies and programs. The statement lists in Section 6 offenses that the Bureau categorizes as "crimes of violence as that term is used in various statutes," and lists in Section 7 "offenses that in the Director's discretion shall preclude an inmate's receiving certain Bureau program benefits." *Id.* at 29. The Bureau explained that Section 7 "lists offenses that are not categorized as crimes of violence, but would nevertheless preclude an inmate's receiving certain Bureau program benefits at the Director's discretion." *Id.* at 30. It further explained that some BOP policies or programs, such as the one

governing inmate discipline and special housing units, require a determination that an inmate committed a crime of violence, but others, such as the one governing early release under 18 U.S.C. 3621(e)(2)(B), also allow denial of the benefit in the discretion of the BOP Director. Pet. Br. App. 30-31. The introductory portion of Section 7 of Program Statement 5162.04 provides that,

> [a]s an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain [BOP] program benefits.
>
> Inmates whose current offense is a felony that:
>
> * * * * *
>
> involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives * * *.

Id. at 40-41.

Subsection 7(b) further specifies that certain offenses may or may not preclude benefits in the Director's discretion, depending on whether the offense involved certain characteristics that reflect that the offense was committed with force. Pet. Br. App. 44. Program Statement 5162.04 indicates that the danger of violence is increased "when drug traffickers possess weapons" during the commission of a drug felony in violation of 21 U.S.C. 841(a). Pet. Br. App. 44. Thus, under Section 7(b) of Program Statement 5162.04, the BOP Director declines, as a matter of discretion, to grant early release to an inmate who was convicted under 21 U.S.C. 841 (except subsection (e)) and 846 (1994 & Supp. IV 1998), if he received a two-level increase in his offense

level under Sentencing Guidelines § 2D1.1 for carrying, possession or use of a firearm. Pet. Br. App. 44, 48. See also Program Statement 5330.10, CN-03, ch. 6, at 1-2 (Oct. 9, 1997) (implementing early release incentive in drug abuse treatment program in accordance with 28 C.F.R. 550.58 as amended and Program Statement 5162.04).

2. On February 21, 1997, petitioner was convicted in the United States District Court for the Southern District of Iowa of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 72 months' imprisonment. That sentence was based in part on a two-level enhancement of petitioner's offense level under Sentencing Guidelines § 2D1.1(b)(1) because petitioner possessed a firearm in connection with his offense. Presentence Report 4, ¶ 7; *id.* at 6, ¶ 17; J.A. 9.

We have been informed that, while serving his term of imprisonment, petitioner obtained a place on a waiting list to participate in a BOP residential drug abuse treatment program. On December 21, 1998, petitioner was notified that he qualified for participation in that program, but that it appeared that he was not provisionally eligible for early release upon completion of the program because his current offense is one that the BOP Director, in her discretion, has identified as an offense that excludes him from early release. J.A. 5-7. The currently scheduled date for petitioner's release from prison, taking into account good conduct time, is June 2, 2002. Pet. 3.

3. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of South Dakota, challenging the provisional denial of his early release. J.A. 8. On

January 6, 1999, the district court granted the petition for habeas relief. J.A. 8-20.

The district court held that the Bureau "may not, in the first instance, exclude those convicted of nonviolent offenses from early release consideration." J.A. 17. The court reasoned that the Bureau's interpretation of 18 U.S.C. 3621(e)(2)(B), as reflected in its current regulation, 28 C.F.R. 550.58, and Program Statement 5162.04, is inconsistent with the statutory language because it allows the Bureau "to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release under section 3621(e)(2)(B)." J.A. 18.

The district court recognized that Section 3621(e)(2)(B) allows the Bureau to exercise discretion to determine who should be granted early release, but concluded that the Bureau cannot exercise its discretion to deny "recognition of eligibility" to inmates who are eligible for consideration under the statute. J.A. 19. The court declared that "[t]he exercise of discretion requires a careful consideration of each individual case." *Ibid.* It concluded that the categorical denial of early release to "all cases within one general group without individual consideration" was not an exercise of discretion. *Ibid.* The court ordered BOP to reconsider petitioner for early release under Section 3621(e)(2)(B) in accordance with its opinion. *Ibid.*

4. The court of appeals reversed. J.A. 23-28.[6] The court emphasized that Section 3621(e)(2)(B) "vests broad discretion in the BOP to determine which indi-

[6] The court of appeals consolidated cases brought by ten federal prisoners that involved the same early-release issue. J.A. 23-24.

viduals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release." J.A. 25. The court observed that the statutory language is discretionary and does not mandate that BOP grant early release to any individual or group of prisoners. J.A. 26. Moreover, the court concluded that Section 3621(e)(2)(B) does not "mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses." J.A. 26. It noted that, "[i]n fact, Congress expected the BOP to make early-release determinations 'based on criteria to be established and uniformly applied.'" *Ibid.* (citing H.R. Rep. No. 320, 103d Cong., 1st Sess. 6 (1993)).

The court of appeals further reasoned that, to the extent that Congress left a gap in the statute for BOP to fill, deference is owed BOP's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845, 866 (1984), if the interpretation constitutes a permissible construction of the statute. J.A. 26. The court observed that BOP had exercised discretion to exclude from eligibility for early release certain categories of prisoners convicted of nonviolent offenses because "their underlying conduct indicates that they pose a serious risk to public safety." J.A. 26-27. That decision, the court concluded, "represent[ed] a manifestly permissible construction of the statute and an appropriate exercise of the BOP's discretion." J.A. 26-27.

The court of appeals rejected the contention that BOP's current regulation and Program Statement 5162.04 are contrary to its earlier decision in *Martin*, 133 F.3d at 1079-1081, which invalidated BOP's 1995 regulation and Program Statement 5162.02. The court

explained that, in *Martin*, it addressed only BOP's attempt to interpret the statutory term "nonviolent offense." The *Martin* court did not address whether "BOP may, as an exercise of its discretion, *see* 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release." J.A. 27. Facing that issue, the court of appeals held that such an exercise of discretion is permissible. J.A. 27.

SUMMARY OF ARGUMENT

As an incentive to encourage prisoners with a substance abuse problem to participate in drug treatment programs while in prison, Congress provided a limited opportunity for the Bureau of Prisons to reduce an inmate's term of imprisonment under 18 U.S.C. 3621(e)(2)(B). Congress also vested the Bureau with broad discretion to determine which of the prisoners who meet the statutory prerequisites of Section 3621(e)(2)(B) (serving a sentence for a nonviolent offense and completion of a substance abuse program) should be granted early release. The statutory language is clear that a grant of early release is not mandatory for a prisoner who meets the statutory prerequisites. It provides that the prison term of a prisoner convicted of a nonviolent offense who successfully completes a drug treatment program "may be reduced by the Bureau of Prisons," by up to one year. 18 U.S.C. 3621(e)(2)(B). The structure and history of the statute confirm the discretionary nature of the authority accorded the Bureau to grant early release.

The Bureau validly exercised its discretion in a categorical manner through promulgation of a regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and Program Statement 5162.04. Under those provisions, BOP denies early

release to prisoners, including petitioner, whose current offense is a felony that involved the carrying, possession, or use of a firearm. That exercise of discretion does not contradict the statute. Congress limited early release to prisoners convicted of a nonviolent offense, but Congress did not intend that all prisoners convicted of a nonviolent offense must be found eligible for the incentive. Rather, Congress vested the Bureau with discretion to grant or deny early release to prisoners convicted of a nonviolent offense. BOP validly exercised discretion to deny early release to certain groups of prisoners on a categorical basis. That action is consistent with the statutory text and legislative purpose, as well as with well-established administrative law principles. See, *e.g.*, *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991); *INS* v. *Yang*, 519 U.S. 26 (1996). Moreover, the categorical denial of early release to the group involved here—prisoners whose felony conviction involved the carrying, possession, or use of firearm—constitutes a sound exercise of BOP's discretion, because of the increased potential of danger to public safety that such prisoners exhibit.

ARGUMENT

THE DIRECTOR OF THE BUREAU OF PRISONS DID NOT ABUSE HER DISCRETION IN CATEGORICALLY DENYING EARLY RELEASE UNDER 18 U.S.C. 3621(e)(2)(B) TO PRISONERS, INCLUDING PETITIONER, WHOSE CURRENT OFFENSE IS A FELONY THAT INVOLVED THE CARRYING, POSSESSION, OR USE OF A FIREARM

A. Section 3621(e)(2)(B) Commits To The Discretion Of The Bureau Of Prisons The Determination Of Which Prisoners Who Satisfy The Statutory Prerequisites For Early Release Are Granted Such Release

1. Section 3621(e)(2)(B) states that the period a prisoner convicted of a nonviolent offense remains in custody after his successful completion of a BOP substance abuse treatment program "may be reduced by the Bureau of Prisons" by up to one year. By using the term "may," Congress placed the ultimate decision whether to grant a prisoner early release in the discretion of the Bureau. "The word 'may,' when used in a statute, usually implies some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983); *Cortez Byrd Chips, Inc.* v. *Harbert Constr. Co.*, 120 S. Ct. 1331, 1336 (2000) (citing *Rodgers*). Although that "common-sense principle of statutory construction" can be "defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute," *Rodgers*, 461 U.S. at 706, that is not the case here. The structure, purpose, and history of Section 3621(e)(2)(B) all compel a reading of the statutory text that is consistent with the usual meaning of "may."

The text of Section 3621(e)(2)(B) places two conditions on the Bureau's authority to grant early release: (1) the prisoner must be serving a sentence for a nonviolent offense, and (2) he must successfully complete a substance abuse treatment program. Section 3621(e)(2)(B) does not mandate that early release be granted to all prisoners who meet the statutory prerequisites. Nor does it place restrictions on the factors that may be considered by the Bureau in exercising its discretion whether to grant early release to prisoners who satisfy the statutory prerequisites.

The discretionary nature of the authority accorded the Bureau under Section 3621(e)(2)(B) is evident when contrasted to the grant of authority under Section 3621(e)(1). Section 3621(e)(1) governs the scope of BOP's responsibility to provide a residential substance abuse treatment program to prisoners. That section states that BOP "shall, subject to the availability of appropriations, provide" a program to "all eligible prisoners." 18 U.S.C. 3621(e)(1). By using the term "shall," Congress imposed a mandatory obligation on BOP under Section 3621(e)(1). If Congress had intended to impose a similar mandate on BOP under Section 3621(e)(2)(B), to require that early release be granted to all persons who committed nonviolent offenses, Congress would have used the term "shall" in Section 3621(e)(2)(B) as well. Congress's decision to employ the two different terms in neighboring statutory provisions reflects a difference in the authority it thereby granted in the two instances. That interpretation accords with "the normal inference" that is drawn when the same statute uses both "may" and "shall"—"that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947); *United States ex*

rel. Siegel v. *Thoman*, 156 U.S. 353, 360 (1895) (use of "shall" in one provision of a statute and "may" in another "indicat[es] command in the one and permission in the other").

Moreover, by using the term "eligible prisoners" in Section 3621(e)(1), a term it expressly defined in 18 U.S.C. 3621(e)(5)(B), Congress evidenced an intent to exert greater control over the scope of BOP's obligation under Section 3621(e)(1) than under Section 3621(e)(2)(B), where it specified only two statutory prerequisites, leaving to BOP's discretion the actual decision whether to grant early release. Congress's definition of "eligible prisoner" cannot support petitioner's argument that Congress intended all prisoners who meet Section 3621(e)(2)(B)'s requirements to be "eligible for a sentence reduction" (Pet. Br. 18-19), because the phrase "eligible prisoner" is nowhere used in Section 3621(e)(2)(B).[7]

Section 3621(e)(2)(A) further confirms that Congress granted the Bureau broad discretionary authority under Section 3621(e)(2)(B). Section 3621(e)(2)(A) provides that, "[g]enerally," any prisoner who, "in the judgment of the Director of the Bureau of Prisons," successfully completes a residential substance abuse treatment program "shall remain in the custody of the

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[7] In addition, the definition of "eligible prisoner" in Section 3621(e)(5)(B) is clearly related only to whether substance abuse treatment should be offered, not to whether early release is warranted. That section states:

> (B) the term "eligible prisoner" means a prisoner who is—
>
> (i) determined by the Bureau of Prisons to have a substance abuse problem; and
>
> (ii) willing to participate in a residential substance abuse treatment program * * *.

Bureau under such conditions as the Bureau deems appropriate." When Section 3621(e)(2)(B) (the very next paragraph) is read against that backdrop, it is apparent that early release is not mandatory for prisoners who meet the statutory prerequisites. Rather, it is left to the discretion of the Bureau. That is consistent with the grant to the Bureau of the broad authority to judge when a prisoner successfully completes a substance abuse treatment program, and to determine the conditions under which a prisoner who completes a treatment program should thereafter be held in custody under Section 3621(e)(2)(A). Congress's grant to the Bureau of such discretion also accords with the broad discretionary powers entrusted it for the overall supervision of federal prisoners. See 18 U.S.C. 4042(a)(1) (BOP "shall * * * have charge of the management and regulation of all Federal penal and correctional institutions"); *United States* v. *Wilson*, 503 U.S. 329, 335 (1992) (BOP "has the responsibility for administering the sentence" of federal offender); *Hewitt* v. *Helms*, 459 U.S. 460, 467 (1983) (prison officials have "broad administrative and discretionary authority over the institutions they manage").[8]

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[8] See also 18 U.S.C. 4081 (BOP discretion to classify and segregate prisoners); 18 U.S.C. 3621(b) (BOP discretion to transfer prisoner from one penal or correctional facility to another); 18 U.S.C. 3622 (BOP discretion to temporarily release prisoner for specified reasons "consistent with the public interest"); *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976) (federal prison officials have "full discretion" to control prisoner classification and eligibility for rehabilitative programs); *United States* v. *Sotelo*, 94 F.3d 1037, 1041 (7th Cir. 1996) (district court has no authority to order restriction on persons with whom prisoner can communicate; court can only recommend that BOP impose such restriction); *United States* v. *Williams*, 65 F.3d 301, 307 (2d Cir. 1995) (sentencing court has no authority to order prisoner confined in particular facility or placed in particular treatment program; such decisions are within BOP's sole discretion); *Prows* v. *BOP*, 981 F.2d 466, 469 (10th Cir. 1992) (BOP retains broad discretion to decide where prisoner may be confined during pre-release period), cert. denied, 510 U.S. 830 (1993).

2. The legislative background of Section 3621(e)(2)(B) demonstrates Congress's intent to vest the Bureau of Prisons with substantial discretion to determine which prisoners should be granted early release. The report of the House Judiciary Committee that accompanied the House bill (H.R. 3350, 103d Cong., 1st Sess. (1993)) containing the original early release provision described the operation of the provision as follows: "In effect, this subparagraph authorizes the Bureau of Prisons to shorten by up to one year the prison term of a prisoner who has successfully completed a treatment program, based on criteria to be established and uniformly applied by the Bureau of Prisons." H.R. Rep. No. 320, *supra*, at 6. During the floor debate in the House, the chairman and the ranking member of the Crime and Criminal Justice Subcommittee of the House Judiciary Committee emphasized that release was not guaranteed by the statute, but is a decision that is left to the BOP. See 139 Cong. Rec. 27,255 (1993) (statement of Rep. Schumer) ("[T]his is not mandatory time off, it is an option, up to the prison authorities."); *id.* at 27,250 (statement of Rep. Sensenbrenner) ("[T]hat is in the discretion of the Bureau of Prisons on whether or not the prisoner's term ought to be reduce[d] upon completion of the program.").

During the floor debate in the Senate on a bill (S. 1607, 103d Cong., 1st Sess. § 1304(d)(2)(1993)) that contained an early release provision that was identical in

relevant respects to the original House version, some Senators voiced concern about the legislation allowing the early release of violent criminals. 139 Cong. Rec. at 27,209 (statement of Sen. Hatch); *id.* at 27,221 (statement of Sen. Grassley). The Senate addressed that concern by amending the early release provision to limit the availability of the incentive to those prisoners who were convicted of nonviolent offenses. See *id.* at 27,505, 27,588, 27,606, 32,286, 32,326. The Senate did not otherwise alter the broad grant of discretion to BOP. The amendment was drafted in a manner that prohibits BOP from releasing prisoners convicted of violent offenses, not in a manner that mandates the release of prisoners convicted of nonviolent offenses.

When the House and Senate went to conference, the House agreed to the Senate's amendment and the Conference Report stated that the House version was being amended "to limit the early release incentive for successful program completion to non-violent offenders." H.R. Rep. No. 711, 103d Cong., 2d Sess. 381 (1994); H.R. Rep. No. 694, 103d Cong., 2d Sess. 411 (1994). The Conference Report also emphasized that the authority provided to the Bureau under the early release provision was "not to be construed as limiting any authority already possessed by the Bureau of Prisons with respect to the release of inmates." H.R. Rep. No. 711, *supra*, at 381; H.R. Rep. No. 694, *supra*, at 411.[9]

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[9] Because it is evident from Section 3621(e)(2)(B)'s text, structure, and history that Congress conferred discretion on BOP to determine which prisoners should be granted early release, there is no basis for applying the rule of lenity as petitioner urges, Pet. Br. 32-33. See *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995).

B. The Bureau Of Prisons' Categorical Denial Of Early Release Is Well Within The Broad Discretion Granted It By Congress

As demonstrated above, the Bureau's interpretation of Section 3621(e)(2)(B) as vesting it with discretion to make early release determinations for prisoners who meet the statutory prerequisites is compelled by the natural meaning of the statutory language read in the context of the statute as a whole. Nonetheless, petitioner essentially contends (Pet. Br. 17-18, 23-24, 29-30) that the Bureau cannot create categorical exclusions from early release and, in particular, that Congress intended to preclude the Bureau from categorically denying eligibility for early release based on characteristics of the offense, once it is found to be a "nonviolent offense."[10] Congress, however, did not address how the Bureau should exercise its discretion within the class of inmates who satisfy the statutory prerequisites for early release. Instead, it left BOP with the responsibility to "strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The Bureau's identification in its regulation, 28 C.F.R. 550.58, and Program Statement 5162.04, of certain categories of prisoners to whom it will not grant early release

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[10] See *Ward* v. *Booker*, 202 F.3d 1249, 1256 (10th Cir.) (the fact that Section 3621(e)(2)(B) focuses on the nature of the prisoner's conviction, *i.e.*, "nonviolent offense," precludes BOP from basing a categorical decision not to allow early release on the underlying facts of the offense that resulted in sentencing enhancement), petition for cert. pending, No. 00-18.

represents a considered judgment by the agency authorized by Congress to make such penological determinations.

As the court of appeals concluded, deference is due the Bureau's regulation, 28 C.F.R. 550.58, and Program Statement 5162.04, because those provisions constitute "an appropriate exercise of the BOP's discretion," J.A. 26-27. See also *Reno* v. *Koray*, 515 U.S. 50, 61 (1995).[11] Congress's decision affirmatively to bar early release for prisoners convicted of violent offenses does not imply that the Bureau must treat prisoners who carried, possessed, or used a firearm in the commission of a nonviolent felony the same as prisoners who did not. Rather, the statute leaves the Bureau discretion in that area, and it is a reasonable exercise of that discretion for the Bureau to determine that prisoners who carried, possessed, or used firearms in the commission of a felony, even a nonviolent offense, pose more of a danger to society than other prisoners, such that service of their entire prison term is warranted before release to the community.[12]

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[11] Indeed, the Bureau implemented the statute & exercised its discretion in this case by denying petitioner early release (J.A. 7)—a delegated agency action the Bureau is authorized to take under the statute. Cf. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (deference is owed to an agency interpretation of its regulation that "assume[d] a form expressly provided for by Congress").

[12] Petitioner's amici raise a claim (Nat'l Ass'n of Crim. Defense Lawyers et al. Amici Br. 19-24), not raised or passed upon below, or pressed by petitioner, that BOP's regulation is invalid because it was promulgated without a notice and comment period before going into effect, as required under the Administrative Procedure Act (APA), 5 U.S.C. 553. Neither the notice nor advance comment period requirements apply, however, to substantive rules where there is good cause for noncompliance, to interpretive rules, or to

1. The court of appeals correctly held that Section 3621(e)(2)(B) does not "mandate that the BOP exercise

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general statements of policies. 5 U.S.C. 553(b)(A) and (B), 553(d)(2) and (3). The advance comment period also does not apply to substantive rules that grant or recognize an exemption or relieve a restriction. 5 U.S.C. 553(d)(1). The Bureau's regulation falls within one or more of those categories. This Court has described "general statements of policy," 5 U.S.C. 553(b)(A), 553(d)(2), as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)); *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993) (same quotation). That term thus includes a regulation like 28 C.F.R. 550.58, in which the Bureau announces the manner in which it intends to exercise the discretion granted it by Congress under 18 U.S.C. 3621(e)(2)(B). Moreover, to the extent that the regulation constitutes a substantive rule, it "grants or recognizes an exemption or relieves a restriction," 5 U.S.C. 553(d)(1), because it guides the Bureau in granting early release to certain prisoners and thereby exempts or relieves those prisoners from service of their full terms of imprisonment. And there was good cause, see 5 U.S.C. 553(b)(B), 553(d)(3), for BOP to promulgate the regulation as an interim rule with an immediate effective date. As BOP explained, it published the change as an interim rule "in order to solicit public comment while continuing to provide consideration for early release to qualified inmates." 62 Fed. Reg. at 53,690. And whatever the merits of amici's APA claim, it will not be of ongoing significance after promulgation of the Bureau's final regulation.

Of course, Program Statement 5162.04 is an internal agency guideline that was not subject to the notice and comment requirement and would warrant deference, in any event, as a permissible implementation of the statute that it administers, under *Koray*, 515 U.S. at 61, and *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662-1663 (2000). See also Program Statement 5330.10, CN-03, ch. 6, at 1-2 (Oct. 9, 1997) (implementing early release incentive in drug abuse treatment program in accordance with regulation and Program Statement 5162.04).

its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses." J.A. 26. Petitioner contends (Pet. Br. 23, 29-30) that, because Congress categorically limited BOP's early release discretion to prisoners convicted of nonviolent offenses, BOP cannot exercise its discretion categorically to establish additional criteria for granting early release. But this Court has upheld analogous exercises of authority by agency officials charged with administering a statute. See *INS* v. *Yang*, 519 U.S. 26 (1996) (statutory provision that established certain prerequisites for obtaining a waiver of deportation did not limit the factors that the Attorney General could consider in determining who, among the class of aliens that satisfied those prerequisites, should be granted a waiver). Indeed, the legislative record is directly to the contrary—Congress intended that early release determinations be made "based on criteria to be established and uniformly applied" by the Bureau. H.R. Rep. No. 320, *supra*, at 6. Thus, Section 3621(e)(2)(B) in no way precludes the Bureau from "particularizing statutory standards through the rulemaking process and barring at the threshold" those prisoners who do not "measure up to them." *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964) (similar, in upholding authority of agency to set general standards notwithstanding Administrative Procedure Act's requirement of a "hearing").

The Bureau's consideration of petitioner's case in a categorical manner under 28 C.F.R. 550.58(a) and Program Statement 5162.04 is consistent with well-recognized administrative law principles. The Court has held that, "even if a statutory scheme requires individualized determinations," an agency "has the authority to rely on rulemaking to resolve certain

issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991); see *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983) (Social Security Act's contemplation of individualized determinations of disability claims based on evidence adduced at a hearing does not bar Secretary "from relying on rulemaking to resolve certain classes of issues"); *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. at 44 (agency not required to repeatedly relitigate issues that may be fairly and efficiently established in single rulemaking proceeding); *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 205 (1956) (even where agency's enabling statute requires it to hold hearing, agency may rely on rulemaking authority to determine issues that do not require case-by-case consideration); cf. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 760-761 (1989) ("law in general * * * does not interpret a grant of discretion to eliminate *all* 'categorical rules'"). That Congress vested BOP with the discretion to grant early release "does not imply a mandate that this must be inevitably done by examining each case rather than by identifying groups." Kenneth Culp Davis, *Administrative Law Text* 145 (3d ed. 1972) (quoting *Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970)).[13]

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[13] The two courts of appeals that invalidated the Bureau's current regulation and Program Statement 5162.04 relied on circuit precedent that had held the Bureau's original regulation and program statement to be invalid based on the conclusion that the Bureau had improperly defined a particular statutory term, "convicted of a nonviolent offense." See *Ward*, 202 F.3d at 1254 (relying on *Fristoe* v. *Thompson*, 144 F.3d 627 (10th Cir. 1998)); and *Kilpatrick* v. *Houston*, 197 F.3d 1134 (11th Cir.) (per curiam), aff'g 36 F. Supp. 2d 1328 (N.D. Fla. 1999) (relying on *Byrd* v. *Hasty*, 142

2. The Bureau of Prisons permissibly construed its discretionary authority under Section 3621(e)(2)(B) to allow it to determine that prisoners convicted of a felony that involved the carrying, possession, or use of a firearm or other dangerous weapon pose a sufficient risk of danger to public safety that they should be denied early release. The fact that Congress responded to concerns about the release of prisoners convicted of violent offenses by drafting the statute to bar their release does not preclude BOP from considering a prisoner's potential dangerousness, as reflected by his prior involvement with a firearm during the commission of a felony, as a factor in determining whether to grant early release. The Court made clear in *INS* v. *Yang* that where Congress confers discretionary authority on a decisionmaker to grant a benefit to persons who satisfy certain statutory prerequisites, the decisionmaker is not precluded from considering factors that are connected to the statutory prerequisites, so long as such consideration does not make a nullity of the statute. 519 U.S. at 30-31. The Bureau's consideration of whether a prisoner's conviction involved the carrying, possession, or use of a firearm certainly does not render Section 3621(e)(2)(B) a nullity; many prisoners may satisfy both the statutory prerequisites and the regulatory criteria for early release. "In Fiscal Year

F.3d 1395 (11th Cir. 1998)), petition for cert. pending, No. 99-2008. The court of appeals correctly recognized (J.A. 27) that its own circuit precedent striking down the original regulation, *Martin* v. *Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), was limited to the Bureau's prior interpretation of "convicted of a nonviolent offense" and, therefore, was not of relevance to the present case which relies on the discretion provided to the Bureau. See also *Bowen* v. *Hood*, 202 F.3d 1211, 1219-1220 (9th Cir.), petitions for cert. pending, Nos. 99-10159 & 99-10221.

1999, 2,633 inmates were released early pursuant to 18 U.S.C. § 3621(e). Since the Bureau implemented this provision, a total of 6,559 inmates have been granted a reduction in their term of imprisonment." Bureau of Prisons, *Substance Abuse Treatment Programs in the Federal Bureau of Prisons, Report to Congress* 12 (Jan. 2000). Moreover, the Bureau's early release regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and Program Statement 5162.04, in no way bar a prisoner like petitioner from participating in the Bureau's residential substance abuse treatment program. They only deny one type of incentive to certain prisoners in a categorical manner, while leaving them eligible for other types of incentives. See 28 C.F.R. 550.57(a).[14]

Denial of early release to prisoners like petitioner is not inconsistent with congressional intent. Although evidence before Congress indicated that an early release incentive would encourage prisoners to participate in highly effective substance abuse treatment programs (see Pet. Br. 24-29), Congress chose not to mandate that the incentive be granted to all prisoners convicted of a nonviolent offense. See pages 17-22, *supra*. Rather, it charged BOP with deciding whether to grant such prisoners early release. BOP has fulfilled that responsibility in a reasonable manner, consistent with its grant of discretion, and in light of its longstanding expertise and experience in protecting the public safety through its classification of prisoners and

[14] The other incentives include "[l]imited financial awards, based upon the inmate's achievement/completion of program phases"; "[c]onsideration for the maximum period of time (currently 180 days) in a Community Corrections Center"; and "[l]ocal institution incentives such as preferred living quarters or special recognition privileges," 28 C.F.R. 550.57(a)(1)-(3).

determination of their appropriate custody status. See pages 20-21, *supra*. In addition to the category at issue here (felony involving firearm possession), BOP has established categories that deny early release to, *inter alia*, inmates "who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses," 28 C.F.R. 550.58(a)(1)(iv), and inmates whose current offense is a felony "[t]hat by its nature or conduct involves sexual abuse offenses committed upon children," 28 C.F.R. 550.58(a)(1)(vi)(D). Those categories rationally ensure that prisoners whose backgrounds suggest that they pose a particular risk to the public, notwithstanding their current conviction of a nonviolent offense, serve their full prison terms. By promulgating these standards as categorical rules, BOP brings to early release determinations, which are made by a large number of BOP employees at facilities located throughout the country, a predictability and uniformity that would otherwise be lacking. See H.R. Rep. No. 320, *supra*, at 6 ("criteria to be established and uniformly applied" by BOP).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

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In The

Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

MARK V. MEIERHENRY*
CLINT SARGENT
DANFORTH, MEIERHENRY
& MEIERHENRY, LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
(605) 336-3075
Counsel for Petitioner

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Petitioner Lopez asserts that the BOP has violated the plain language of 18 U.S.C. § 3621 by categorically denying Mr. Lopez consideration for early release. The BOP's position is that Congress's use of the word "may" in Section 3621(e)(2)(B) grants the BOP unfettered discretion to determine which inmates, if any, are eligible for early release after successful completion of the drug treatment program. According to the BOP, the Director has been granted the authority by Congress to exclude any, and all, prisoners from the early release program.

The BOP's construction of the word "may" is flawed for at least two reasons: (1) Such a construction is contrary to the structure, purpose and legislative intent of Section 3621(e)(2)(B); and, (2) Such a conclusion runs counter to the fundamental principles of individual liberty and freedom from incarceration.

1. The Legislative Intent Surrounding 18 U.S.C. § 3621(e)(2)(B) Is Inconsistent With The BOP's Position Of Unfettered Discretion In Administering The Early Release Program.

Congress used the word "may" in Subsection (e)(2)(B) rather than "shall" because it did not want to create a right to early release for prisoners. Congress was well aware that had it used the word "shall," it would have been creating a mandatory provision, thereby requiring the BOP to grant early release to every single prisoner that completed the drug treatment program (excluding those convicted of a violent offense, of course). Petitioner Lopez does not argue that this was

Congress's intent. Congress's intent was that every prisoner convicted of a nonviolent offense who completed the drug treatment program would be eligible *for consideration* for early release.

The BOP cites this Court's decision in *U.S. v. Rodgers*, 461 U.S. 677 (1983), as support for its argument that 18 U.S.C. § 3621(e)(2)(B) grants the BOP total discretion to administer Congress's early release program. Lopez submits that the rule of construction stated in *Rodgers* supports the opposite reading of Section 3621(e)(2)(B).

This Court stated that the word "may", when used in a statute, usually implies some degree of discretion. *Rodgers*, 461 U.S. at 706. "This common sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *Id.* The word "may" does not always imply that an entity granted the permission to act has the authority to act in any manner it so chooses. The entity's conduct must not conflict with the legislative intent or the purpose of the statute.

The legislative intent and purpose of Section 3621(e)(2)(B) is fighting crime and reducing criminal recidivism by providing drug treatment to as many federal prisoners as possible. This goal is accomplished by providing incentives to participate in drug treatment. Congress's goal is not accomplished by establishing administrative barriers to the program's incentives.

There are many clear indications of Congress's intent in establishing the early release program. The legislative history is replete with Congressional demands for

increased participation in the drug treatment program. See Pet. Op. Br. at 8-14, 24-32. The BOP ignores that part of Congress's work which reviewed the performance of drug rehabilitation in federal prisons and found the performance unsatisfactory.[1]

Congress made clear that simply offering drug treatment to prisoners was not enough. Providing incentives for participation was, in Congress's judgment, the difference between a successful drug treatment program and an unsuccessful program. See H.R. Rep. No. 320 at 4. The BOP argues that legislation intended to increase participation in the program was actually a grant of authority to the BOP to set up barriers to participation as the BOP sees fit. The BOP's argument cannot be reconciled with the clear purpose of § 3621(e)(2)(B).

The structure of the statutory language indicates that Congress' use of the word "may" in Subsection (e)(2)(B) was a grant of permission to act in accordance with Congress' drug and crime-fighting plan. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 360 (1895) (use of the word "may" indicates a grant of permission).

Congress used "shall" in Section 3621(b) to order the BOP to provide drug treatment for all prisoners. Congress used "in the judgment of the Director of the Bureau of Prisons" and "as the Bureau deems appropriate" in

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[1] "There is an immense gap between what could be done to prevent crime with substance abuse treatment and what is now being done by the Bureau of Prisons." H.R. Rep. No. 320, 103rd Cong., 1st Sess. at 2-3 (1993).

Subsection (e)(2)(A) to grant the BOP broad discretion to determine successful completion of the program and to establish conditions of confinement. Congress used "may" in Subsection (e)(2)(B) to grant the BOP permission to deviate from the mandate in Subsection 3621(a) that requires the BOP to hold prisoners for the full term of their sentence, not to deny eligible prisoners any consideration whatsoever. The structure of the statute demonstrates Congress drafting three separate terms/phrases to express three different intentions to the BOP.

Congress set up clear categories of inmates that would be eligible for consideration for early release based on their pre-conviction conduct, to wit, "prisoners convicted of non-violent offenses." Congress did not establish any guidelines for eligibility based on post-conviction conduct. Congress could quite adequately deny eligibility to certain categories of inmates based on pre-conviction conduct, and did so by excluding inmates convicted of violent offenses. What Congress was not equipped to do was to create categories or guidelines for ineligibility based on post-conviction conduct. It is this post-conviction conduct that compelled Congress to use permissive rather than mandatory language in its drafting of the early release provision.

By use of the word "may," Congress gave the BOP permission to consider post-conviction conduct in deciding who should receive a sentence reduction. Congress had already established the guidelines and categories of inmates that were eligible for consideration based on pre-conviction conduct. The discretion that Congress granted the BOP was not to create further excluded categories of pre-conviction conduct, but rather the discretion to look

at the prisoner's post-conviction incarceration conduct to determine whether a sentence reduction should be granted. It is illogical to think that Congress would impliedly grant the BOP the authority to create additional categories of pre-conviction behavior that automatically remove a prisoner from consideration for early release, when Congress specifically created its own category of pre-conviction conduct that would deny eligibility. If Congress wanted other pre-conviction conduct to categorically prohibit a prisoner from the incentive, it would have written the prohibitions in the statute. Congress used the permissive word "may" to allow the BOP the discretion to deny early release to those inmates that are statutorily eligible, but who do not deserve early release based on their conduct while in prison.

The BOP has arrogated to itself a far greater discretion than Congress intended: the authority to categorically exclude persons Congress categorically included. The current regulation and program statement governing the early release program do not conform to the legislative intent surrounding Section 3621(e)(2)(B) because the BOP is not considering all prisoners that are eligible for the early release incentive. The BOP has declared that a smaller number than Congress directed shall be given consideration for early release. This is clearly in conflict with the purpose of the Act. Congress directed that only one class of prisoner be excluded by limiting eligibility for consideration to those convicted on non-violent offenses.

2. The Fundamental Principles Of Individual Liberty And Freedom From Incarceration Dictate That The Existence Of Discretion Requires Its Exercise.

A categorical exclusion from eligibility of certain inmates is not an exercise of discretion at all. The BOP claims that it has unfettered discretion to determine which inmates shall be eligible. However, it is not exercising any discretion by categorically excluding all inmates within a certain class or category from eligibility for early release.

When addressing a person's liberty, the existence of discretion requires its exercise. See *Dorszynski v. United States*, 418 U.S. 424 (1973) (holding that existence of discretion in youth offender statutes requires its exercise); *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951) (holding that fixed bail amounts violated "statutory and constitutional standards" requiring an exercise of discretion).

The BOP has not exercised any discretion in Mr. Lopez's case. It has placed him in a category that denies him any consideration for early release. Decisions made by reference to predetermined categories are not based on discretion and are not consistent with the principles this Court laid down in *Dorszynski* and *Stack*.

The BOP cites *INS v. Yang*, 519 U.S. 26 (1996), *Federal Power Comm'n v. Texaco*, 377 U.S. 33 (1964), *American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991), and several others in support of its position that it is entitled to make categorical exclusions based on its unfettered discretion granted by Congress. Each case cited, and each exercise of agency discretion (or lack thereof), is related to a civil issue, not

criminal. Not one case addressed the issue of discretion to determine appropriate incarceration or discretion to limit a person's liberty. This distinction is paramount. *Dorszynski* and *Stack* illustrate the level of consideration required by a person or body charged with the discretionary authority to incarcerate another or limit another's liberty.

Different standards or rules are not uncommon in this country's justice system when a person's liberty is at stake. The distinction between decisions that affect an individual's freedom and an individual's monetary or civil interests are common. This nation takes great care in protecting a person's right to be free from incarceration. A person defending his individual liberty must be proven guilty beyond a reasonable doubt, while a person defending his pocketbook need only be proven to have wronged another by a preponderance of the evidence. In criminal cases, a person may not be compelled to testify against himself and his refusal to testify may not be used to infer guilt. The same is not true in civil cases. When statutory construction is an issue, the rule of lenity provides that any statutory ambiguities will be resolved in favor of the criminal defendant. The same is not true in other types of cases.

This country's justice system places a person's individual liberty above all else. The utmost care is required when a determination affecting a person's freedom is decided. Procedures that may be permissible in other types of actions are forbidden when a person's liberty is at stake. The case law cited above illustrates other factual scenarios where a person entrusted with the duty of exercising discretion in determining a person's liberty

chose to create categorical exclusions or rules instead of giving each situation individual analysis. Such categorical exclusions were struck down as abuses of discretion for failing to exercise individualized discretion. A similar result is required here.

This Honorable Court has been presented two different interpretations of 18 U.S.C. § 3621(e)(2)(B) by the respective parties.

Under the BOP's interpretation of the statute, Congress has granted the BOP unfettered discretion in administering the early release program. The statute states that all inmates convicted of violent offenses are excluded. In addition, the Director of the BOP may set up whichever additional categories of prisoners which she feels do not warrant consideration for eligibility for the program. The Director has decided that anyone that received a sentence enhancement for possession of a weapon is categorically ineligible. Under the BOP's theory, the Director could have categorically excluded anyone convicted of a drug offense or, for that matter, anyone convicted of any felony.

Under Lopez's interpretation of the statute, Congress gave the BOP permission to grant sentence reductions as an incentive for successful completion of drug treatment. Congress limited consideration for eligibility for early release to those prisoners whose pre-conviction conduct did not include a violent offense. Congress did not create a right to a sentence reduction to those who had qualifying pre-conviction conduct. Congress left it to the BOP to

individually decide whether those prisoners with qualifying pre-conviction conduct deserved a sentence reduction based on their post-conviction conduct.

The plain language of the statute, the structure and purpose of the statute, the legislative intent surrounding the statute's enactment and the fundamental principles of liberty support Lopez's interpretation of 18 U.S.C. § 3621(e)(2)(B).

CONCLUSION

Petitioner Lopez respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit Court of Appeals and order the Bureau of Prisons to consider Mr. Lopez for a sentence reduction in accordance with the Memorandum Opinion and Order of the District Court.

Dated this 7th day of September, 2000.

Respectfully submitted,

MARK V. MEIERHENRY
CLINT SARGENT
DANFORTH, MEIERHENRY & MEIERHENRY
315 South Phillips Avenue
Sioux Falls, SD 57104-6318
(605) 336-3075

Counsel for Petitioner

(10)

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Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, WARDEN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER CHRISTOPHER A. LOPEZ

STEPHEN R. SADY
Chief Deputy Federal Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
503-326-2123
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of three non-profit, non-partisan organizations with interests in the federal criminal justice system: the National Association of Criminal Defense Lawyers (NACDL), Families Against Mandatory Minimums Foundation (FAMM), and the Association of Federal Defenders (AFD).[1]

The NACDL's membership is comprised of more than 10,000 lawyers and 22,000 affiliate members representing every state. Members of the NACDL regularly represent drug-involved defendants charged in federal courts.

FAMM, which was founded in 1991, conducts research, promotes advocacy, and educates the public regarding the excessive costs of mandatory minimum sentences. FAMM has thirty chapters and 18,000 members nationwide.

The AFD is a voluntary association of assistant federal defenders and other legal workers employed by federal public and community defenders that is dedicated to improving the quality of

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[1]The parties have consented to the filing of this amicus curiae brief. Consent letters from the parties have been forwarded to the Clerk of the Court. In accordance with Supreme Court Rule 37(6), counsel certifies that no counsel for a party authored this brief, and no person or entity other than the amici curiae made a monetary contribution to the preparation or submission of this brief.

justice in the federal criminal justice system. The AFD has more than 300 members.

The present case involves interests fundamental to each organization. The time reduction under 18 U.S.C. §3621(e) not only encourages inmates to conquer their addictions, but preserves public dollars while ameliorating disproportionate mandatory minimum sentences. The amici's first-hand experience may shed light on the demands of in-prison drug treatment, the reduction's importance to prisoners in appropriate mitigation of punishment, and the efficacy of the program in addressing the causes of criminal involvement and preventing recidivism.

SUMMARY OF ARGUMENT

The plain meaning of Section 3621(e) provides that persons convicted of drug trafficking, whose sentences have been enhanced for firearm possession, are categorically eligible for the incentive of a one-year reduction in sentence upon successful completion of residential substance abuse treatment. Effectuating the plain meaning of the statute furthers the congressional goal of promoting participation in a rigorous and difficult residential program that reduces recidivism. At the same time, the sentence reduction only

applies to prisoners who are not categorically so dangerous that they should be excluded from the program as violent offenders.

The initial regulation promulgated by the BOP to implement Section 3621(e) construed the statutory language "convicted of a nonviolent offense" as the opposite of a "crime of violence" under 18 U.S.C. §924(c)(3). However, BOP program statements categorically disqualified all prisoners convicted of drug-trafficking offenses who received a sentence enhancement for weapon possession. Across the country, prisoners challenged their disqualifications.

The overwhelming majority of circuits correctly determined that the plain meaning of "prisoner convicted of a nonviolent offense" included prisoners convicted of drug-trafficking offenses who received the two-level sentencing enhancement for weapon possession. Such prisoners are not convicted of a "crime of violence" under well-established law construing Section 924(c). However, the October 1997 BOP rules reversed these courts' decisions and categorically excluded the formerly-eligible prisoners.

The 1997 rules are invalid for several reasons. First, the BOP violated the Administrative Procedures Act (APA)'s

requirement of notice and comment before implementing the 1997 regulations. The rule-making provisions of 5 U.S.C. §553 expressly apply to BOP rule-making through 18 U.S.C. §3625, and the BOP explicitly invoked the APA in promulgating its interim rule. However, the rule was not published in the Federal Register until October 15, 1997, even though it was formally implemented on October 9, 1997 -- over two months before the expiration of the December 15, 1997, period for comment. Because no exception to the notice-and-comment requirement exists in this case, the October 1997 interim rule is invalid.

Second, the 1997 interim rules are invalid because the BOP simply perpetuated its statutory interpretation of "convicted of a nonviolent offense" under the rubric of generalized discretion. As is clear from district courts' findings of fact, which are fully supported by the administrative record, the BOP improperly sought to overrule judicial decisions on statutory construction in violation of the principles of *stare decisis* and separation of powers articulated in *Neal v. United States*, 516 U.S. 284, 295 (1996). Most district courts have found that the generalized discretion asserted by the BOP was pretextual; its true object was to overrule the rejection of

its statutory position. In rejecting these district court decisions, some circuit courts failed to accord the deference to fact-finding required by *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985), and Rule 52 of the Federal Rules of Civil Procedure.

Third, the rules are invalid under the *Chevron* doctrine. These prisoners are categorically eligible for the incentive under the plain meaning of the statute. The BOP retains its broad discretion to exclude any prisoner who, in the warden's individualized exercise of discretion, constitutes a danger if granted early release. Because the rule creates a categorical exclusion inconsistent with the plain meaning of the statute, the regulation is invalid under *United States v. LaBonte*, 520 U.S. 751, 762 n.6 (1997), and *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The agency action is not entitled to full *Chevron* deference in any event because the rules were not subject to the notice and comment required by the APA.

OPERATION OF THE SECTION 3621(e) INCENTIVE PROGRAM

To help combat the problem of recidivist substance abusers, the BOP set up experimental residential substance abuse treatment

programs prior to 1994. Very few prisoners participated. Without an incentive, most prisoners were reluctant to submit themselves to segregated housing, loss of prison industry jobs, full disclosure of private information and feelings to other inmates and to staff, and the hard work of confronting difficult behavioral and psychological issues.

To encourage more prisoners to seek treatment for their substance abuse problems, Congress enacted the Section 3621(e) incentive to fulfill the BOP's mandate to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. §3621(b). Congress specifically noted the success that various state substance abuse treatment programs had in substantially reducing relapse and recidivism. Congress directed that the BOP make residential substance abuse treatment available to an increasing number of eligible prisoners over the years. As an incentive to encourage prisoner participation prerequisite to curbing substance abuse and recidivism, Congress provided that prisoners convicted of "nonviolent offenses" could receive a reduction of up to one year from their sentence.

Due in large part to the incentive program, the number of prisoners participating in residential treatment has significantly increased.[2] This increased participation has had the desired effect of reducing relapse and recidivism:

> Federal inmates who underwent treatment were 73% less likely to be rearrested in the first six months after release than untreated inmates. Inmates who received treatment were also 44% less likely than those who had not received treatment to be detected for drug use within the first six weeks of their release.[3]

The program is very demanding. The BOP determines whether a prisoner has a substance abuse problem. 18 U.S.C. §3621(e)(5)(B)(i)). Eligible prisoners sign a behavior contract and agree to forego other available programming in order to participate. They live in segregated facilities within the prison. The BOP mental health and substance abuse specialists implement an array of treatments, such as rational-emotive/rational-behavioral therapy, development of interpersonal skills, changing criminal lifestyles, and

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[2]FEDERAL BUREAU OF PRISONS, SUBSTANCE ABUSE TREATMENT PROGRAMS, REPORT TO CONGRESS, at 8-9 (January 1999).

[3]FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU: ACCOMPLISHMENTS AND GOALS, at 1 (1998). *See also* FEDERAL BUREAU OF PRISONS, TRIAD DRUG TREATMENT EVALUATION: SIX-MONTH REPT., EXECUTIVE SUMMARY (1998).

relapse prevention.[4]

The prisoner is not deemed to have successfully completed the program until three phases are fulfilled. First, the prisoner must graduate from the residential component of the program, which usually takes between nine and twelve months. Second, there must be no failure during the in-prison transitional component. Third, the prisoner must successfully complete six months of community corrections.[5] If at any time during the residential, transitional, or community corrections components the prisoner commits a violation (for example, by using a controlled substance), the time reduction is forfeited, and the prisoner receives no benefit.[6]

Participation in the incentive program is limited by a number of restrictions implemented by the BOP.[7] Prisoners with prior convictions for specified violent crimes are excluded from the program. All prisoners who have detainers, whether for adjudicated

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[4]FEDERAL BUREAU OF PRISONS, SUBSTANCE ABUSE TREATMENT PROGRAMS, REPORT TO CONGRESS, at 5 (1999).

[5]The community corrections component during incarceration is authorized by 18 U.S.C. §3624(c).

[6]Program Statement 5330.10 at 5-7 (Oct. 9, 1997).

[7]*See* 28 C.F.R. §550.58 (1997).

or unadjudicated state charges or for immigration proceedings, are ineligible for the community corrections component and therefore cannot receive the Section 3621(e) incentive. Most importantly, the warden retains the individualized discretion to determine that a prisoner, regardless of other qualifications, should not be released into the community early and, therefore, is ineligible for the Section 3621(e) incentive.[8]

The anecdotal information matches the BOP's statistics -- the program is very successful. The residential treatment programs are an anomaly within prison cultures -- prisoners bare their souls to fellow inmates and staff. The need for full disclosure, protected only by other inmates' assertion of confidentiality, may actually endanger prisoners who disclose sensitive information regarding personal history or cooperation with authorities. Nonetheless, prisoners report that the program provides life-changing and life-saving skills. The incentive persuades prisoners to go through the door; once there, the incentive helps keep them there.

The number of prisoners affected by the categorical

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[8]Such individualized decisions, as opposed to rule-making, are explicitly exempted from the APA. 18 U.S.C. §3625.

exclusion based on mere possession of a firearm is substantial. From 1991 to 1999, more than 10% of drug-trafficking sentences -- 2,290 defendants sentenced in 1999 alone -- involved a two-level gun enhancement.[9] The gun enhancement is generally for mere possession -- even a co-conspirator's possession -- of a firearm.[10]

The Section 3621(e) time reduction is unique as the object of agency rule-making. Unlike other areas of administrative regulation, reduction in the actual time of incarceration is at stake, not rules governing business and manufacturing, not civil interests in areas such as employment and immigration, not even conditional release from custody. When the BOP determines that a prisoner is eligible and that prisoner begins participation, the BOP changes the prisoner's projected release date by reducing the term of

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[9]U.S. SENTENCING COMMISSION, 1991-1999 Datafile, USSCFY91-USSCFY99.

[10]If the firearm is an operative factor in relation to a drug offense, the consecutive mandatory minimum sentence under 18 U.S.C. §924(c) may be charged. Where the prisoner is sentenced under Section 924(c), there is no gun enhancement under the guidelines because the factor has already been taken into consideration (U.S.S.G. §2K2.4, comment. (backg'd)), but the prisoner is excluded from the Section 3621(e) incentive under separate rules. Program Statement 5162.04 § 6(a) (Oct. 9, 1997).

incarceration to be served, usually by twelve months.[11] When the prisoner successfully completes the three components of the program, the BOP unconditionally releases the prisoner to the district court's jurisdiction on supervised release with the term of incarceration permanently shortened by one year.[12] The prisoner's interest in actual freedom should subject the executive agency rule-making to especially close scrutiny. *See Dorszynski v. United States*, 418 U.S. 424, 443-44 (1974) (treatment program that "may" be available to youthful offender required exercise of individual sentencing discretion); *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951) (qualified availability of pretrial release required consideration of individual circumstances).

ARGUMENT

A. Categorical Inclusion Of These Statutorily Eligible Prisoners Furthers The Congressional Goals Of Ameliorating Over-Incarceration And Reducing Recidivism By Encouraging Participation In Intensive In-Prison Residential Substance Abuse Treatment.

The legislative background for the 1994 amendments

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[11]Program Statement 5330.10, Attachment H (Oct. 9, 1997).

[12]Program Statement 5880.28 at 78 (June 30, 1997); *see also* 18 U.S.C. §3624(a).

creating the Section 3621(e) time reduction included three trends: (1) federal incarceration rates were sharply increasing largely due to mandatory minimum statutes and guidelines sentencing; (2) the percentage of arrestees with substance abuse problems was markedly high; and (3) in-prison substance abuse treatment programs were proving their effectiveness.

Federal incarceration rates have increased greatly since the first federal mandatory minimum drug statutes were enacted in 1986. In 1986, 12,119 of the 31,831 prisoners in federal prison -- 38% -- were serving drug sentences. By 1998, the number of prisoners serving drug sentences increased to 58,291 out of 95,552 federal prisoners -- 58% of the prison population.[13] During this period,

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[13]FEDERAL BUREAU OF PRISONS, QUICK FACTS (APRIL 2000). This increase is consistent with a long-term trend:

FEDERAL PRISON POPULATION

Year	Total sentenced population	Total sentenced drug offenders	Percentage of sentenced prisoners who are drug offenders
1970	20,686	3,384	16.30%
1975	20,692	5,540	26.70%
1980	19,023	4,749	24.90%
1985	27,623	9,491	34.30%
1990	47,847	25,037	52.30%
1995	79,347	48,118	60.60%
1998	95,522	56,291	58.90%

federal drug prosecutions increased sharply, both as a percentage of federal sentencings and in raw numbers. In 1991, the 13,281 federal drug sentencings accounted for 42% of federal non-immigration sentences; in 1999, the 21,634 federal drug sentences constituted 50% of such federal sentences.[14]

Addiction and substance abuse are highly correlated to arrests. 1994 witnessed an increasing trend of arrestees testing positive for illicit drugs, with the percentage increasing from 60% in 1992, to 63% in 1993, and to 66% in 1994.[15] This trend continues. In 1991, 32% of federal prisoners reported using drugs in the month before the offense, and 10% reported drinking at the time of the offense; by 1997, the percentage of self-reported drug users increased to 45% , and those reporting drinking increased to 20%.[16]

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[14]U.S. SENTENCING COMMISSION, 1991-1999 Datafile, USSCFY91-USSCFY99.

[15]NATIONAL INST. OF JUSTICE, 1994 ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES, at 1 (1995).

[16]Christopher J. Mumola, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997, at 1 (January 1999).

Not surprisingly, drug use is correlated to drug-trafficking crimes.[17]

Prior to 1994, a number of states established in-prison treatment programs for substance abuse. Follow-up studies indicated that the programs were effective in greatly reducing relapse and recidivism. Congress specifically referred to such studies in deciding that a federal incentive program was needed. *See* 139 Cong. Rec. H8723-01, H8727 (Nov. 3, 1993) (National Drug Research Institute study reported that 79% of the prisoners who underwent treatment had not reoffended after five years compared to only 33% who did not undergo treatment); H.R. Rep. 103-320 (Nov. 3, 1993) (noting success of corrections treatment programs in New York, Wisconsin, and Virginia); *id.* at 5 (although 50% of federal inmates had substance abuse problems, only 6% of the prisoners had participated in the substance abuse program since its inception). The committee concluded that "the experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life

[17]*See generally* NATIONAL INST. OF JUSTICE, ARRESTEE DRUG ABUSE MONITORING PROGRAM, 1998 ANNUAL REPORT (1999).

opportunities, and will undertake to complete the program." *Id.* at 6.

The Section 3621(e) incentive program is effective in reducing recidivism and substance abuse among prisoners, including those convicted of drug-trafficking offenses whose sentences were increased for weapons possession. Remedial legislation "should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Bifulco v. United States*, 447 U.S. 381, 387 (1980) (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"). The Court should reject administrative actions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *BATF v. FLRA*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 291-91 (1965)).

B. Congress Intended That Prisoners "Convicted Of A Non-Violent Offense," Which Includes Drug Traffickers, Should Be Categorically Eligible For The Section 3621(e) Incentive.

The enactment of Section 3621(e) reflected congressional intent that drug traffickers should be eligible for sentence reduction

based on completion of a demanding and effective treatment program.

As originally proposed, Section 3621(e) simply provided that all prisoners who successfully completed residential substance abuse treatment were eligible for up to a one-year reduction in their sentence. By amendment, Congress added the qualifying phrase "convicted of a nonviolent offense." The phrase "non-violent offense" was used in the Sentencing Commission's then-guideline on diminished capacity departures, U.S.S.G. §5K2.13, and was generally interpreted to mean an offense that was not a "crime of violence" under 18 U.S.C. §924(c)(3) or did not involve actual violence. *United States v. Valdez*, 158 F.3d 1140, 1142-43 (10th Cir. 1998) (citing cases).[18]

In the original regulation implementing Section 3621(e), the BOP explicitly referred to Section 924(c)'s definitional section to distinguish offenses that are not nonviolent for the purposes of

[18]Between 1991 and 1999, thirty-seven drug traffickers who had received the two-level weapon possession enhancement received diminished capacity departures as eligible nonviolent offenders. U.S. SENTENCING COMMISSION, 1991-1999 Datafile, USSCFY91-USSCFY99.

Section 3621(e).[19] Drug-trafficking offenders, regardless of whether they received a two-level enhancement under U.S.S.G. §2D1.1(b)(1) for mere possession of a gun, were "convicted of a nonviolent offense" under both Section 924(c) and U.S.S.G. §5K2.13. The case law sharply distinguished between "crimes of violence" and drug-trafficking offenses under Section 924(c). *Downey v. Crabtree*, 100 F.3d 662, 668 (9th Cir. 1996) (citing cases). When the BOP categorically denied eligibility for such prisoners based on a program statement purportedly implementing the regulation, the circuits almost uniformly rejected the program statement as a violation of the plain and unambiguous meaning of the statute. *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998), *modified*, 172 F.3d 411 (6th Cir. 1999); *Byrd v. Hasty*, 142 F.3d 1395 (11th Cir. 1998); *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998); *Fristoe v. Thompson*, 144 F.3d 627 (10th Cir. 1998); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996).

Despite Congress's clear intent that prisoners be encouraged to participate in an intensive substance abuse treatment program, the BOP has sought to categorically bar prisoners, who have been

[19]28 C.F.R. §550.58 (1995).

judicially declared statutorily eligible, from participating in the Section 3621(e) incentive program because they are not "nonviolent" offenders. Congress has already specifically addressed the question of categorical eligibility based on the offense of conviction, which includes drug traffickers who are serving a longer sentence based on weapon possession. Congress's intent that such prisoners receive the treatment incentive should not be administratively trumped, especially where the BOP retains broad discretion to exclude prisoners individually determined to be too dangerous to participate in community corrections. *Ward v. Booker*, 202 F.3d 1249, 1255-57 (10th Cir. 2000); *Kirkpatrick v. Houston*, 36 F. Supp. 2d 1328, 1329-30 (N.D. Fla.), *affirmed*, 197 F.3d 1143 (11th Cir. 1999); *see Bowen v. Hood*, 202 F.3d 1211, 1225-27 (9th Cir. 2000) (Thomas, J., dissenting); *Orr v. Hawk*, 156 F.3d 651, 654-56, *modified*, 172 F.3d 411 (6th Cir. 1999).

C. The BOP Promulgated The October 1997 Interim Rules In Violation Of Notice-And-Comment Requirements Of The APA.

The BOP's October 1997 rules are not only contrary to judicial interpretation of Section 3621(e) but were also adopted in violation of the APA. 5 U.S.C. §553. Non-compliance with the

statutory requirements for promulgating new rules provides an independent basis for striking down the BOP's ill-conceived rule. Indeed, had the BOP complied with the notice-and-comment requirements of the APA before putting the contested rules into effect, the need for judicial scrutiny of the rules and the resulting circuit split might have been avoided.[20]

The APA establishes specific rule-making requirements that apply to all federal agencies except those specifically exempted. 5 U.S.C. §553(a). Certain BOP actions relating to determinations for individual prisoners are exempt from the APA's requirements, but the exemption does not extend to the BOP's rule-making activities.[21]

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[20]Given four years of participation in the Section 3621(e) program, many prisoners with the same sentencing enhancement as Mr. Lopez have received the incentive without harm to the public. The rule also conflicts with other BOP rules eliminating mere possession of a firearm during a drug-trafficking offense as a "public safety" factor -- that is, a factor requiring increased security measures to ensure society's protection. Program Statement 5100.07 §7 (1999) (noting that possession of firearms as a public safety factor warranting increased security was discontinued in 1995).

[21]18 U.S.C. §3625 (removing applicability of certain sections of the APA, but not Section 553, which establishes rule-making requirements); *see* S. Rep. No. 98-225, at 149 n.363 (1984), *reprinted in* U.S.C.C.A.N. 3182, 3332 ("The APA continues to apply to regulation-making authority of the Bureau of Prisons.").

The BOP explicitly invoked its rule-making authority under the APA when promulgating the October 1997 interim rules. 62 Fed.Reg. 53690.

Section 553 provides generally that, at least thirty days before the effective date, an agency must publish notice of proposed rule-making in the Federal Register and afford "interested persons an opportunity to participate . . . through submission of written data, views, or arguments." Section 553 applies to all substantive rules unless the rule falls under one of the few exceptions. *See generally Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979).

The BOP's October 1997 rules are substantive because they require BOP staff to categorically disqualify from Section 3621(e) eligibility all prisoners who possessed weapons during an offense. 5 U.S.C. §553(b)-(d). The rules themselves are the measure the BOP uses in the administrative adjudicative process and, thus, have the effect of law. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87,

99 (1995).[22]

Because the interim regulations were substantive rules, "the promulgation of these regulations must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S. at 303. The Court "must determine whether the agency complied with the procedures mandated" by the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549 n.21 (1978). Failure to follow Section 553(d)(3)'s thirty-day advance notice requirement invalidates the regulation. *See Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974) (promulgation of regulation without following the APA "renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries").[23]

While the BOP invoked the rubric of notice and comment,

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[22]Even if the rules were deemed interpretive, under *Guernsey*, they are an abrupt departure from the construction of the former regulation as well as the Operating Memoranda and therefore would still require notice and comment. 514 U.S. at 100 ("We can agree that APA rulemaking would still be required if [the regulation] adopted a new position inconsistent with any of the Secretary's existing regulations.").

[23]Program Statement 5162.04 purports to interpret the regulations at issue here. Because those regulations were promulgated in violation of the APA, the program statement would also be invalid.

the agency failed to comply with the specific notice-and-comment requirements of the APA. On and before October 9, 1997, before the interim rules were even published, the BOP put the rules into immediate effect and began rejecting new applicants who had possessory offenses. In fact, at least one prisoner was denied eligibility based on the new rules on September 27, 1997 -- *two weeks before they were even issued. Gavis v. Crabtree*, 28 F. Supp. 2d 1264, 1266 (D. Or. 1998).

Not until October 15, 1997, did the BOP publish the proposed interim rules in the Federal Register. 62 Fed.Reg. 53690 (Oct. 15, 1997). That publication stated the retroactive effective date of the rules as October 9, 1997. The belated Federal Register notice established a comment period, as required by the APA, but the final date for comments was December 15, 1997, more than two months after the effective date of the interim rules. By putting the rules into effect before they were even published, the BOP violated the APA requirement that publication of a rule be made at least thirty days before its effective date.

The published notice did not invoke any exception to the thirty-day requirement, nor would any exception apply. The

exceptions to the thirty-day requirement are available only where the substantive rule relieves a restriction or grants an exemption, or if good cause is found and reasons to waive the thirty-day advance notice requirement are stated in the text of the proposed rule. 5 U.S.C. §553(d). To avail itself of the latter exception, the agency must determine that compliance with the thirty-day requirement is either impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. §553(b)(B). In all other cases, "notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.*, 441 U.S. at 316.

Neither of the exceptions to the APA's thirty-day notice-and-comment requirement applies to the BOP rules. The rules do not exempt the prisoners from a restriction or grant an exemption. On the contrary, the rules have precisely the opposite effect: they disqualify otherwise eligible prisoners from the incentive program. Nor has the BOP asserted in the Federal Register any good cause to waive the thirty-day requirement. The only reason the BOP provided for the change in the rules was its intention to "resolve conflicts" among the circuit courts' interpretation of the statute.

There was no urgency that excused compliance with the thirty-day rule, especially considering that similarly-situated prisoners had been receiving the incentive for the past four years without apparent harm to the public.

D. The District Courts Have Found As A Matter Of Fact That The Agency Is Merely Perpetuating Its Erroneous Construction Of The Statute.

The district courts in Section 3621(e) litigation have found that the BOP's purported exercise of discretion simply reiterated the agency's statutory interpretation that the circuit courts previously rejected.[24] Such factually-based decisions are entitled to deference where based on the fact-finder's review of documentary evidence, inferences from other facts, and familiarity with the area in dispute. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous...."). According appropriate deference to factual findings

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[24]The circuit opinions in the present case, *Ward, Kirkpatrick*, and *Bowen* arose from district court decisions granting relief to prisoners under the October 1997 rules. *See also Samples v. Scibana*, 74 F. Supp. 2d 702 (E.D. Mich. 1999); *Nelson v. Crabtree*, 59 F. Supp. 2d 1081 (D.Or. 1999); *Williams v. Clark*, 52 F. Supp. 2d 1145 (C.D. Cal. 1999); *Guido v. Booker*, 37 F. Supp. 2d 1289 (D.Kan. 1999); *Hicks v. Brooks*, 28 F. Supp. 2d 1268 (D. Col. 1998).

is critical to resolution of the claim that, under the separation of powers doctrine and *stare decisis*, the 1997 rules are an invalid attempt to reverse judicial determination of a statute's meaning.

In *Neal v. United States*, 516 U.S. 284 (1996), this Court addressed a claim that subsequent amendments by the Sentencing Commission could alter the previous judicial determination of a statute's meaning. Even with full notice-and-comment and the Sentencing Commission's quasi-judicial status, the Court adhered to its previous interpretation of the statute, invoking both the judicial role and *stare decisis*. *Neal*, 516 U.S. at 295.

The district courts have held the October 1997 rules invalid because the underlying documentary and regulatory context establishes that the agency simply used the gloss of discretion to repeat its invalidated interpretation of the statute. The published district court opinions in this area have generally found the BOP's new rules invalid based in part on findings regarding the nature of the rule change.

The findings that the BOP's October 1997 rules are simply a continuation of its rejected discretionary interpretation of the statute are amply supported by the record. The BOP admitted in the

Federal Register that it sought to avoid judicial rulings. 62 Fed. Reg. 53690 (Oct. 15, 1997).[25] Both the former and the October 1997 program statements use virtually indistinguishable language in categorizing offenses and in providing the BOP's rationale and examples. *Scroger v. Booker*, 39 F. Supp. 2d 1296, 1308-09 (D.Kan. 1999), *affirmed*, *Booker*, *supra*; *compare* Program Statement 5162.04 §6(b) (Oct. 9, 1997) *with* Program Statement 5162.02 §9 (April 23, 1996). Further, in previous litigation, the BOP specifically claimed that its statutory construction was correct based on former 42 U.S.C. §3796iii-2(1)-(A) (repealed), which used a definition of violent offender indistinguishable from the new rule. As the Sixth Circuit noted, the new regulations are simply a rerun of that failed statutory argument. *Orr*, 156 F.3d at 653.

The failure to respect district court findings regarding the nature of the new rules is one fault line in the split of the circuits. The Eighth Circuit and the Ninth Circuit majority declared prior statutory construction "as of no relevance." *Bellis v. Davis*, 186 F.3d

[25]The BOP's violation of the APA supports the conclusion that the October 1997 rules were merely a continuation of a failed litigation position.

1092, 1095 (8th Cir. 1999); *see Bowen*, 202 F.3d at 1219 (adopting *Bellis* regarding irrelevance of former statutory construction). The BOP's perpetuation of its statutory misinterpretation of Section 3621(e) formed an important part of the reasoning of the judges who found the rules invalid. *Booker*, 202 F.3d at 1255; *Kilpatrick*, 36 F. Supp. 2d at 1329; *see Bowen*, 202 F.3d at 1226-27 (Thomas, J., dissenting).

E. The Regulation Is Invalid Under *Chevron* Because It Is Inconsistent With An Unambiguous Statute.

The majority of courts that addressed what, if any, *Chevron* deference is owed found the statute plain and unambiguous. *See Byrd*, 142 F.3d at 1397 (citing cases) (BOP interpretation excluding those who received sentence enhancements for weapons possession conflicts with statute's plain meaning). Where the statute is unambiguous, agency rules are not permissible if inconsistent with authorizing statutes. *LaBonte*, 520 U.S. at 762 n.6; *Chevron*, 467 U.S. at 842-43.

The BOP's disregard of the plain and unambiguous terms of the statute is compounded by its violation of the APA. Full *Chevron*

deference only applies where the rule has undergone "the rigors of the Administrative Procedur[e] Act, including public notice and comment." *Reno v. Koray*, 515 U.S. 50, 61 (1995); *accord Christensen v. Harris County*, 120 S.Ct. 1655, 1662 (2000). The Sixth Circuit has specifically found that full *Chevron* deference does not apply to these rules because they were promulgated without notice and comment. *Orr*, 156 F.3d at 655.[26] The contrary, incorrect assumption may have contributed to the circuit split. In *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997), the court erroneously assumed that the new rule was promulgated in compliance with the notice-and-comment requirements of the APA. Both *Bellis*, 133 F.3d at 1094, and the *Bowen* majority, 202 F.3d at 1219-20, relied on this flawed case.[27]

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[26]In *Orr*, the court ruled in favor of the *pro se* petitioner, under the October 1997 rules, then modified its opinion to delete some references to the new rules upon the BOP's argument on rehearing that the new rules did not apply retroactively to Mr. Orr. The court's finding regarding *Chevron* survived the modification.

[27]*Bush* is also flawed because, under the BOP's own rules on retroactivity, the *pro se* prisoner was not subject to the October 1997 rules because he had entered the treatment program prior to the rule's effective date. Nonetheless, the BOP made no effort to correct the court's unbriefed error. The same error undermines the validity of *LaSorsa v. Menifee*, 10 F.Supp.3d 316 (S.D. N.Y. 1998), *affirmed*, 182 F.3d 900 (2nd Cir. 1999) (table).

The Court has stated that where "the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (1984). Once a statute is found to be unambiguous, no deference is owed to the agency. *LaBonte*, 520 U.S. 751 n. 6 (1997). Here, the circuit courts correctly held that the plain and unambiguously expressed intent of Congress was that drug traffickers, regardless of sentencing factors, are eligible for the Section 3621(e) incentive. The BOP's inconsistent rule, promulgated without the required notice and comment, is invalid under *Chevron* and *LaBonte*.

CONCLUSION

In practical terms, the question is not whether to release or to confine drug offenders who possessed firearms. The question is whether offenders who possessed firearms and who are substance abusers should be released with their substance abuse problems intact, or whether they should be released a short time earlier with their substance abuse problems treated. Because Congress has answered this question, the BOP cannot provide a conflicting answer. Therefore, the opinion of the Eighth Circuit allowing the

BOP to contradict the statute and congressional intent should be reversed.

Respectfully submitted,

Stephen R. Sady
Chief Deputy Federal Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204
503-326-2123

Counsel for Amici Curiae, NACDL,
FAMM, and AFD

Of Counsel:

Robert C. Nissen
Oblan, Spivak, McClelland, Maier & Neustadt
1744 Jefferson Davis Highway
Arlington, Virginia 22202
703-412-6267

Kyle O'Dowd
General Counsel
Families Against Mandatory Minimums Foundation
1612 K. Street, N.W., Suite 1400
Washington, D.C. 20006
202-822-6700

Barbara E. Bergman
University of New Mexico School of Law
1117 Stanford Drive NE
Albuquerque, NM 87131
505-277-3304